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AND ON APPEAL THEREFROM IN THE

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CASES

DETERMINED BY THE

CHANCERY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

LUNACY.

RAYNER *v.* PRESTON.

[1879 R. 136.]

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Jan. 28, 29, 31;
April 8.

Vendor and Purchaser—Fire Insurance—Fire after Contract but before Completion—Right to Insurance Money.

19 ChD
571-3
11 QBD
383, 399

A vendor contracted with a purchaser for the sale of a house which had been insured by the vendor against fire. The contract contained no reference to the insurance. After the date of the contract but before the time fixed for completion the house was damaged by fire, and the vendor received a sum of money from the office:—

Held, by *Brett* and *Cotton*, L.JJ. (affirming the decision of *Jessel*, M.R.), *James*, L.J., *dissentiente*, that the purchaser, who had completed his contract, was not entitled as against the vendor to the benefit of the insurance.

Per Brett and *Cotton*, L.JJ.: Whether the office could not compel the vendor to refund the money, *quære*. (1)

THIS was an appeal by the Plaintiffs from a decision of *Jessel*, M.R. (1).

The appeal came on to be heard on the 28th of January, 1881.

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(1) 14 Ch. D. 297.

(1) But see Castellain v Preston 8 QBD 613, Chitty J.
Revd 11 QBD 380 CA

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Roxburgh, Q.C., and *Ingle Joyce*, for the Appellants:—

The Plaintiffs have completed their contract and paid the purchase-money. They were, from the time of the contract, persons interested in the property, and are, under 14 Geo. 3, c. 78, s. 83, entitled to have the money applied in reinstating the premises, that section being of general and not merely local application: *Ex parte Gorely* (1). A policy of fire insurance is a contract of indemnity: *Darrell* v. *Tibbitts* (2), and not, like a life policy, a contract to pay a sum of money in a certain event. The Plaintiffs, as soon as they had completed their purchase, became entitled to the benefit of that contract of indemnity. The insurance company, unless the Defendants are trustees for the Plaintiffs, could have got this money back from them, for they have sustained no loss against which indemnity was required; the Defendants, therefore, are trustees for the Plaintiffs. *Collingridge* v. *Royal Exchange Assurance Corporation* (3) tends to support this view, as does *Reynard* v. *Arnold* (4). The Master of the Rolls considered himself bound by *Poole* v. *Adams* (5); but we contend that that case, having regard to *Darrell* v. *Tibbitts*, is not law, and ought to be overruled. Its injustice is monstrous, as observed in *Dart's* Vendors and Purchasers (6), and it was decided without any reference being made to the decision of Lord *St. Leonards* in *Garden* v. *Ingram* (7), a case between mortgagor and mortgagee, but in which much of the reasoning, as observed by Mr. *Dart*, equally applies to a purchase out and out, and is strongly in our favour, the distinction taken in *Lees* v. *Whiteley* (8) not existing here. In *Durrant* v. *Friend* (9) a specific legatee of insured chattels was held not entitled to the benefit of an insurance on them; but the circumstances were peculiar: the testator and the chattels perished together, so that the legacy was adeemed, and there are observations of Vice-Chancellor *Parker* which are decidedly in our favour. In *Edwards* v. *West* (10) the *ratio decidendi* was that the fire had occurred before the exercise of the option to pur-

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(1) 4 D. J. & S. 477. 10 Jur N S 1055
(2) 5 Q. B. D. 560.
(3) 3 Q. B. D. 173, 177.
(4) Law Rep. 10 Ch. 386.
(5) 12 W. R. 683.
(6) 4th Ed. p. 744; 5th Ed. p. 812.
(7) 23 L. J. (Ch.) 478.
(8) Law Rep. 2 Eq. 143.
(9) 5 De G. & Sm. 343.
(10) 7 Ch. D. 858.

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chase. *Robertson* v. *Skelton* (1) is a strong instance how completely the purchaser is substituted for the vendor from the date of the contract. In *Paine* v. *Meller* (2) the insurance had expired before the fire, and the only question decided was whether the vendor had incurred any liability by not keeping it up. This is no authority in support of *Poole* v. *Adams* (3).

Chitty, Q.C., and *Bardswell*, for the Defendants:—

A policy of fire insurance is a contract of indemnity, that is, of indemnity to the person who effects it; and unless there are some stipulations to make it assignable, it is a purely personal contract. This policy, according to its terms, is not assignable, except on certain conditions which do not apply here. Suppose a son takes a lease and his father covenants to indemnify him against the rent, it cannot be contended that if the son sells the purchaser could claim the benefit of the covenant. *Paine* v. *Meller* is an express decision that the policy does not pass with the house as an appurtenance to it. Collateral contracts do not pass by an assignment of the premises, as was decided in *Gottlieb* v. *Cranch* (4), where the grantee of an annuity subject to a power of repurchase insured, and on a repurchase the grantor was held not entitled to the policy; and the same view was taken in *Knox* v. *Turner* (5). In *Dobson* v. *Land* (6), it was decided that a mortgagee cannot in the absence of contract insure at the expense of the mortgagor, the insurance, in the absence of any bargain, being a matter with which the mortgagor had nothing to do, and conversely, the mortgagor could take no benefit from the policy. *Hamilton* v. *Baldwin* (7) goes on the same principle.

[JAMES, L.J.—The policy there was a life policy, which has no similarity to a fire policy.]

Poole v. *Adams* is express in our favour; and in *Bunyon* on Fire Insurance (8) the law is treated as settled. The Appellants say that the vendors are trustees for them; but they are only

(1) 12 Beav. 260.
(2) 6 Ves. 349.
(3) 12 W. R. 683.
(4) 4 D. M. & G. 440.
(5) Law Rep. 5 Ch. 515.
(6) 8 Hare, 216.
(7) 15 Beav. 232.
(8) 2nd Ed. p. 181.

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trustees by virtue of the contract for purchase, and no relation of trustee and *cestui que trust* can be established as to the policy unless it is included in the contract, which it cannot be held to be: *Poole* v. *Adams* (1); *Lees* v. *Whiteley* (2); *Edwards* v. *West* (3). As to *Ex parte Gorely* (4), we cannot ask the Court to overrule it, but it was a surprise to everybody, being opposed to *Vernon* v. *Smith* (5), where the Act was treated as only extending to the area within the bills of mortality. The Appellants cannot stop short of saying that the Defendants would have been liable to them if they had not kept up the policy, for if they were trustees of it for the Appellants they would be bound to preserve it for their benefit, which is negatived by *Paine* v. *Meller* (6) and *Dowson* v. *Solomon* (7). The Appellants cannot claim the benefit of the statute 14 Geo. 3, c. 78, for the money was paid before any request had been made to the insurance company to apply it in reinstating the premises: *Simpson* v. *Scottish Union Insurance Company* (8).

Roxburgh, in reply:—

In *Paine* v. *Meller* Lord *Eldon* did not decide what Vice-Chancellor *Kindersley* appears, in *Poole* v. *Adams*, to have thought that he did; he decided nothing as to the title to the policy-money but only as to the liability of the vendor to keep it up.

[BRETT, L.J.:—Was not the *ratio decidendi* this, that the purchaser had no interest in the policy?]

Lord *Eldon* does not appear to have applied his mind to any such point as that. It is urged that I have no right unless I make out a contract. Now, I buy a house covered by a policy of insurance, the money recoverable on which is by the statute liable to be applied in reinstating the property. I buy a house not a ruin, and the policy, which only gives me what I bought, ought to be treated as held for my benefit. I do not contend that the vendor is bound to keep it up, but I claim the benefit of it if existing. The vendors have no right to the money; if they do

(1) 12 W. R. 683.
(2) Law Rep. 2 Eq. 143.
(3) 7 Ch. D. 858.
(4) 4 D. J. & S. 477. 10 Jur NS 1085
(5) 5 B. & A. 1.
(6) 6 Ves. 349.
(7) 1 Dr. & Sm. 1. 6 Jur NS 33
(8) 1 H. & M. 618. 9 Jur NS 712

not hold it as trustees for the Appellants they are liable to pay it back to the insurance company. In *Edwards* v. *West* (1), when the fire happened the purchaser was a stranger to the property, for he had not declared his option.

[JAMES, L.J.:—Suppose a freeholder insures his house and dies, and shortly after his death the house is burnt down. Does the executor or the devisee or heir, as the case may be, take the money?]

I should say that the executor took it as trustee for the heir or devisee, but there does not seem to be any authority on the point. The Appellants were interested, and had a right to claim to have the money applied in reinstating the property. If, then, the vendors get it, I ask the Court to say that it ought to be applied in that way.

April 8. COTTON, L.J.:—

This is an appeal from a judgment of the Master of the Rolls dismissing the action. The Plaintiffs purchased from the Defendants a messuage and workshops. Between the date of the contract and the time fixed for completion the buildings purchased were injured by fire. The vendors had before the contract insured the buildings against fire, but there was not in the contract any mention of this fact or of the policy. The Plaintiffs brought an action to establish their right to a sum received by the vendors from the insurance office, or to have it applied in or towards reinstating the buildings injured. The Master of the Rolls decided against their claim, and from this decision the Plaintiffs appealed.

It was contended by the Appellants that they were entitled to the moneys, 1. on general principles, irrespective of any special circumstances alleged to exist in the case; 2. under the provisions of the Act 14 Geo. 3, c. 78, either alone or with the aid of the special circumstances of this case.

On the first point it was urged that, although the contract did not mention the policy, it gave the Plaintiffs, as purchasers, a right to all contracts to the benefit of which the vendors were entitled, and of which the execution would be beneficial to or im-

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(1) 7 Ch. D. 858.

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prove the thing purchased. This was inconsistent with one of the conditions on the back of the policy, which stipulated that assigns of the property (with certain exceptions, not including a purchaser) should not be entitled to the benefit of the insurance. But, independently of that objection, I am of opinion that the contention of the Appellants cannot prevail. The contract passes all things belonging to the vendors appurtenant to or necessarily connected with the use and enjoyment of the property mentioned in the contract, but not, in my opinion, collateral contracts; and such, in my opinion, at least independently of the Act 14 Geo. 3, c. 78, the policy of insurance is. It is not a contract limiting or affecting the interest of the vendors in the property sold, or affecting their right to enforce the contract for sale, for it is conceded that, if there were no insurance and the buildings sold were burnt, the contract for sale would be enforced. It is not even a contract in the event of a fire to repair the buildings, but a contract in that event to pay the vendors a sum of money which, if received by them, they may apply in any way they think fit. It is a contract, not to repair the damage to the buildings, but to pay a sum not exceeding the sum insured or the money value of the injury. In my opinion, the contract of insurance is not of such a nature as to pass without apt words under a contract for sale of the thing insured.

But the Appellants' case was put in another way. It was said that the vendor is, between the time of the contract being made and being completed by conveyance, a trustee of the property for the purchaser, and that as, but for the fact of the legal ownership of the building insured being vested in him, he could not have recovered on the policy, he must be considered a trustee of the money recovered. In my opinion, this cannot be maintained. An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contract which a Court of Equity will give effect to by transferring the property sold to the purchaser, and so far as he is a trustee he is so only in respect of the property contracted to be sold. Of this the policy is not a part. A vendor is in no way a trustee for the purchaser of rents accruing before the time fixed for completion, and here the fire occurred and the right to recover the money accrued before the day fixed for com-

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11 QBD 380.

pletion. The argument that the money is received in respect of property which is trust property is, in my opinion, fallacious. The money is received by virtue or in respect of the contract of insurance, and though the fact that the insured had parted with all interest in the property insured would be an answer to the claim, on the principle that the contract is one of indemnity only, this is very different from the proposition that the money is received by reason of his legal interest in the property.

It remains to be considered whether the statute of 14 Geo. 3, c. 78, can give the Plaintiffs any right to the money. In my opinion, the statute does not of itself so connect the money with the land sold as to entitle the Plaintiffs successfully to contend that, under the contract, they were entitled to the money. I give no opinion whether the Plaintiffs, as purchasers who are liable to the vendor for the full amount of the purchase-money, even though the buildings are burnt, are persons who can (possibly to the prejudice of the office) insist that the money is to be applied in rebuilding. Even if they were so entitled, the Act only gives a right to insist on the money being so applied, and their claim to have this done is the foundation of and essential to the existence of their right. But it was urged that the vendors misled the Plaintiffs, and thus prevented them from insisting on their rights under the statute. In my opinion, this has not been established by the Plaintiffs. The evidence of the Plaintiff, *E. Rayner*, the younger, who is not supported by the other Plaintiff, though present when the conversation relied on took place, is contradicted by the Defendants' solicitor, the person whose statements are said to have misled the Plaintiffs, and the alleged misrepresentation is at the utmost a statement of the law, which, in my opinion, if made, was erroneous, but which the Plaintiffs have contended to be correct. The Plaintiffs were not entitled, as against the Defendants, to rely on a statement of opinion made by the solicitor of the Defendants as to the legal right of the parties, and, in my opinion, the Plaintiffs cannot establish their claim by the special circumstances on which they rely.

The Appellants, however, contended that there was authority in their favour, and it therefore becomes necessary to consider shortly the cases relied upon. The most important, and that which

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apparently is most in their favour, is *Garden* v. *Ingram* (1), a decision of Lord *St. Leonards*. He, affirming a decree of Vice-Chancellor *Knight Bruce*, declared that the purchaser from the mortgagee of a lessee was entitled to the benefit of a policy of insurance effected in pursuance of a covenant contained in the lease in the joint names of the lessor and lessee, and ordered the Defendant, the lessee, to concur with the landlord in giving a receipt for the money. But there the lease contained a provision that any money recovered on the policy should be laid out in reinstating the buildings injured by fire; and this, in my opinion, was the ground on which the decision was based, and this is the view of the case expressed by Vice-Chancellor *Kindersley* in *Lees* v. *Whiteley* (2). The Appellants also relied on the case of *Durrant* v. *Friend* (3), where Vice-Chancellor *Parker*, though he refused to give a legatee of specific chattels, which perished at the same time with the testator, the benefit of an insurance effected on the chattels by the testator, used expressions which shew that he thought the legatee would have been entitled to the policy if the chattels were shewn to have existed after the testator's death. But this was *dictum* only, not decision. In *Garden* v. *Ingram*, Lord *St. Leonards* refers to a case not quoted in argument, and of which he does not give the name, in which it had been decided that a remainderman was entitled to a policy effected by a tenant for life. No such case was quoted to us, and the only case of the sort which I have been able to find is *Norris* v. *Harrison* (4), in which Lord *St. Leonards* was counsel, and of which he probably had an imperfect recollection. In that case it is true a remainderman did receive the balance of a fund received by a previous tenant for life on account of a policy effected by such tenant for life, but he did so because the executor and residuary legatee of the tenant for life had by his will treated the fund as appropriated for the benefit of the remainderman.

In my opinion, therefore, there is no decision in favour of the Appellants. Against them there is the direct decision of Vice-Chancellor *Kindersley* in *Poole* v. *Adams* (5). It is urged by the

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(1) 23 L. J. (Ch.) 478.

(2) Law Rep. 2 Eq. 148, 149.

(3) 5 De G. & Sm. 343.

(4) 2 Madd. 268.

(5) 12 W. R. 683.

Appellants that the Vice-Chancellor arrived at this decision from an erroneous view of Lord *Eldon's* judgment in *Paine* v. *Meller* (1). In my opinion, though the decision of Lord *Eldon* is not expressly in point, yet the part of his judgment quoted by the Master of the Rolls does to some extent support the view of the Vice-Chancellor in the case referred to. In my opinion the judgment of the Master of the Rolls was correct.

BRETT, L.J.:—

For a reason which will presently appear, viz., the different opinion of Lord Justice *James*, I give with some fear the result of the, I must say, very clear opinion which I have in this case.

This action is brought by the Plaintiffs against the Defendants to recover money which is in the hands of the Defendants; and, therefore, if the action had been brought at Common Law, it would have been an action for money had and received. That action was always treated at Common Law as being founded upon equity, and therefore it seems to me that the decision in this case, whatever it ought to be, would be the same whether it should be considered to be a decision at Common Law or in Equity.

It seems to me that the question raised between the Plaintiffs and the Defendants calls upon us to consider, first of all, the nature of a policy of fire insurance; and, secondly, what was the relation with regard to the policy and to the property between the Plaintiffs and the Defendants in this case. Now, in my judgment, the subject-matter of the contract of insurance is money, and money only. The subject-matter of insurance is a different thing from the subject-matter of the contract of insurance. The subject-matter of insurance may be a house or other premises in a fire policy, or may be a ship or goods in a marine policy. These are the subject-matter of insurance, but the subject-matter of the contract is money, and money only. The only result of the policy, if an accident which is within the insurance happens, is a payment of money. It is true that under certain circumstances in a fire policy there may be an option to spend the money in rebuilding the premises, but that does not alter the fact that the only liability of the insurance company is to pay money. The contract, therefore, is a contract with regard to the payment of money, and it is a contract made between two persons, and two persons only, as a contract.

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(1) 6 Ves. 349.

In this case there was a contract of insurance made between the Defendants and the insurance company. That contract was made by the Defendants, not on behalf of any undisclosed principal, not on behalf of any one interested other than themselves. The contract was made by the Defendants solely and entirely on their own behalf, and at a time when they had no relation of any kind with the Plaintiffs. It was a personal contract between the Defendants and the insurance office, to which they were the sole parties. It is true that under certain circumstances a policy of insurance may, in Equity, be assigned, so as to give another person a right to sue upon it; but in this case the policy of insurance, as a contract, never was assigned by the Defendants to the Plaintiffs. It would have been assigned by the Defendants to the Plaintiffs if it had been included in the contract of purchase, but it was not. Any valuation of the policy, any consideration of increase of the price of the premises in consequence of there being a policy, was wholly omitted. There was nothing given by the Plaintiffs to the Defendants for the contract. The contract, therefore, neither expressly nor impliedly, was assigned to the Plaintiffs; and, so far as regards the contract of insurance, there never was any relation of any kind between the Plaintiffs and the Defendants.

But there did exist a relation between the Plaintiffs and the Defendants, not with regard to the subject-matter of the contract, but with regard to the subject-matter of the insurance. There was a contract of purchase and sale between the Plaintiffs and the Defendants in respect of the premises insured. It becomes necessary to consider accurately, as it seems to me, and to state in accurate terms, what is the relation between the two people who have contracted together with regard to premises in a contract of sale and purchase. With the greatest deference, it seems wrong to say that the one is a trustee for the other. The contract is one which a Court of Equity will enforce by means of a decree for specific performance. But if the vendor were a trustee of the property for the vendee, it would seem to me to follow that all the product, all the value of the property received by the vendor from the time of the making of the contract ought, under all circumstances, to belong to the vendee. What is the relation between them, and what is the result of the contract? Whether there shall ever be a conveyance depends on two conditions; first of all, whether the title is made out, and, secondly, whether the money is ready; and unless those two things coincide at the time when the contract ought to be completed, then the contract never will be completed and the property never will be conveyed. But suppose at the time when the contract should be completed, the title should be made out and the money is ready, then the conveyance takes place. Now it has been suggested that when that takes place, or when a Court of Equity decrees specific performance of the contract, and the conveyance is made in pursuance of that decree, then by relation back the vendor has been trustee for the vendee from the time of the making of the contract. But, again, with deference, it appears to me that if that were so, then the vendor would in all cases be trustee for the vendee of all the rents which have accrued due and which have been received by the vendor between the time of the making of the contract and the time of completion; but it seems to me that that is not the law. Therefore, I venture to say that I doubt whether it is a true description of the relation between the parties to say that from the time of the making of the contract, or at any time, one is ever trustee for the other. They are only parties to a contract of sale and purchase of which a Court of Equity will under certain circumstances decree a specific performance. But even if the vendor was a trustee for the vendee, it does not seem to me at all to follow that anything under the contract of insurance would pass. As I have said, the contract of insurance is a mere personal contract for the payment of money. It is not a contract which runs with the land. If it were, there ought to be a decree that upon the completion of the purchase the policy be handed over. But that is not the law. The contract of insurance does not run with the land; it is a mere personal contract, and unless it is assigned no suit or action can be maintained upon it except between the original parties to it. My Brother *Cotton* has mentioned the cases in Equity. As I have said, it seems to me that the case is the same in Equity as at Common Law. At

Common Law, with regard to marine polices, it has been always held that where there is a policy, and where the subject-matter of the insurance is sold during the running of the policy, no interest under the policy passes unless it is made part of the contract of purchase and sale, so that it would be considered in a Court of Equity as assigned. The leading case on the subject is the case of *Powles* v. *Innes* (1), in which it is stated that "A person who assigns away his interest in a ship or goods after effecting a policy of insurance upon them and before the loss, cannot sue upon the policy except as a trustee for the assignee in a case where the policy is handed over to him upon the assignment, or there is an agreement that it shall be kept alive for his benefit." Lord *Abinger* and Lord *Wensleydale* both said that the mere fact of making the contract of purchase and sale does not pass any interest in the policy, that there must be a bargain with regard to the policy in order to pass the interest. That is more clearly expressed by Mr. Justice *Quain* in the case of the *North of England Pure Oil Cake Company* v. *Archangel Maritime Insurance Company* (2), where he lays down as settled law that "On the sale of a thing insured no interest in the policy passes to the vendee unless at the time of the sale the policy be assigned either expressly or impliedly." That seems to me to have been the law always in Courts of Law, and it seems to me that Vice-Chancellor *Kindersley*, in the case which has been referred to, lays it down that that was the well-settled and recognised law in Courts of Equity just as much as in Courts of Common Law.

✓ I therefore, with deference, think that the Plaintiffs here cannot recover from the Defendant, on the ground that there was no relation of any kind or sort between the Plaintiff and the Defendant with regard to the policy, and therefore none with regard to any money received under the policy.

JAMES, L.J.:—

I am unable to concur in affirming the judgment of the Master of the Rolls. According to my view of the case the Plaintiff's contention is founded not only on what I may call the natural equity which commends itself to the general sense of the lay

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(1) 11 M. & W. 10.

(2) Law Rep. 10 Q. B. 249.

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world not instructed in legal principles, but also on artificial equity as it is understood and administered in our system of jurisprudence.

I am of opinion that the relation between the parties was truly and strictly that of trustee and *cestui que trust.* I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is *in fieri* the relation of trustee and *cestui que trust.* But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri.* But when the contract is performed by actual conveyance, or performed in everything but the mere formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui que trust.* That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser. And that, in my opinion, is the correct definition of a trust estate. Wherever that state of things occurs, whether by act of the parties or by act or operation of law, whether it is ascertained from the first or after a period of suspense and uncertainty, then there is a complete and perfect trust, the legal owner is and has been a trustee, and the beneficial owner is and has been a *cestui que trust.*

This being the relation between the parties, I hold it to be an universal rule of equity that any right which is vested in a trustee —any benefit which accrues to a trustee, from whatever source or under whatever circumstances, by reason of his legal ownership of the property—that right and that benefit he takes as trustee for the beneficial owner. If the policy of insurance in this case were a collateral contract, such as the policy which a creditor effects on the life of his debtor, the case would be wholly different. But the policy of fire insurance is not, in my opinion, a collateral contract, it is not a wagering contract, a contract that if a fire happens then a certain sum of money shall be paid to the insurer; it is in terms and in effect a contract that, if the property is injured then the insurance company will make good the actual damage sustained by the property. That damage, and that damage only, gives the right and is the measure of the right, and it seems to me impossible to say that it is not by reason of the legal ownership and in respect solely of the injury done to that legal ownership that the right to recover from the insurance company accrued to the insured. If the fire in this case had happened through the wrongful or negligent act of a third person while the contract was *in fieri* the legal right to sue for the damage would be in the vendor, but on the completion of the contract the purchaser would be entitled to use the name of the vendor as his trustee to sue for the damage so sustained, or, if the damages had actually been recovered in the interval, to recover the damages from the vendor. And it appears to me that there is no distinction in principle between this right and the right to use the vendor's name in an action on the contract of indemnity against loss by fire which the policy of insurance is. It is not, in my view of the case, at all material to consider what would be the case if after actual conveyance and during the currency of the policy a fire had occurred. The vendor in that case would have no right as between him and the insurance office, and the purchaser would have no right of action, because one of the conditions of the policy excludes it, and, independently of that condition, the policy would, or might probably be held not to run with the land in the hands of the subsequent owner, and in that case there would not be that which is the foundation of the right—legal ownership and right in one person, and equitable ownership in another.

No doubt it is a mere accident that there was such a policy and there was such a right. The vendor could not have complained if there had been no insurance. But that has occurred in a great variety of cases in which equitable rights have arisen. Where there is a creditor, a debtor, and a surety, and the surety finds out that by something to which he was not privy and of which he had never heard, somebody else had become surety, or the creditor had obtained security, the surety has a right to obtain contribution from such surety, or to obtain such security as the case may be, and the creditor releasing such surety or parting with such security would probably find himself in considerable peril.

In the same city in which this controversy has arisen there occurred some years ago a great destruction of property by reason of an explosion of gunpowder caused by a fire. Houses were damaged, not by fire but by the explosion caused by a fire in another neighbouring place. The insurance offices thought that it was for their interest to be very liberal and treat the damage from the explosion as a damage by fire within the policies, and to pay accordingly. This was a mere act of liberality. They thought it was for their permanent benefit commercially to be liberal, and they were liberal accordingly. See *Taunton* v. *Royal Insurance Company* (1). I cannot myself doubt that if a trustee, or a vendor who had become trustee by the completion of his contract, had received this bounty he would have received it by reason of his trusteeship, and would have had to give it up to his *cestui que trust* or purchaser.

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In my view of the case it is perhaps unnecessary to refer to the Act of Parliament as to fire insurance. But that Act seems to me to shew that a policy of insurance on a house was considered by the Legislature, as I believe it to be considered by the universal consensus of mankind, to be a policy for the benefit of all persons interested in the property, and it appears to me that a purchaser having an equitable interest under a contract of sale is a person having an interest in the house within the meaning of the Act. I believe that there is no case to be found in which the liability of the insurance office has been limited to the value of the interest of the insured in the house destroyed. If a tenant for life having insured his house has the house destroyed or damaged by fire, I have never heard it suggested that the insurance office could cut down his claim by shewing that he was of extreme old age or suffering from a mortal disease. In the case of *Collingridge* v. *Royal Exchange Assurance Corporation* (2), the vendor recovered the whole amount of the loss, although it was absolutely certain, having regard to the solvency of his purchaser, that he would really never suffer any loss at all, personally or otherwise, as trustee for such purchaser.

Of authority on the subject, there is, no doubt, the express decision of Vice-Chancellor *Kindersley* against the Plaintiff, but against that there are to be set off the very distinct opinions of

(1) 2 H. & M. 135. 10 Jur N.S. 291

(2) 3 Q. B. D. 173.

Lord *St. Leonards* and Vice-Chancellor *Parker*, men of great knowledge of equity and of great accuracy even in their *dicta*.

But I prefer to rest my judgment on the fact that the relation between the vendor and the purchaser became, and was in law, as from the date of the contract and up to the completion of it, the relation of trustee and *cestui que trust*, and that the trustee received the insurance money by reason of and as the actual amount of the damage done to the trust property. The Plaintiff puts his case also on the ground of the representations made to him by the Defendant's solicitor and agent. What took place appears to me to be this. The solicitor said to the purchaser, I don't know who is entitled, but the vendor is the only person who has a legal claim, and I will make the claim accordingly whichever is entitled, and the purchaser left the matter in his hands. Now the purchaser could at that time have applied to the office to compel the money to be laid out in restoring the building. And I am of opinion that when the money was under these circumstances obtained from the office, it reached the vendor's hands according to the then rights of the parties as between them and the insurance office, that is to say, as money which ought to be laid out in reinstating the premises, or, in other words, as money which the purchaser alone had any real or substantial interest in.

BRETT, L.J.:—

I should like to add to what I have said that I feel very great doubt whether as between the Defendants and the insurance company the Defendants can keep the money.

COTTON, L.J.:—

I quite concur in that doubt.

Solicitors for Plaintiffs: *F. Venn & Son.*
Solicitors for Defendants: *Torr & Co.*

H. C. J.

In re BYWATER.

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[1878 B. 373.]

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C. A.
April 13.

Will—Inconsistent Clauses—Direction as to Time of Payment inconsistent with prior Gift.

A testator gave to his wife, so long as she should continue his widow and until all his four daughters by his former wife should attain twenty-one or die under twenty-one, an annuity of £800, and a further annuity of £100 in respect of each of such daughters who should for the time being be under twenty-one, such annuities to be employed by her in maintaining herself and his said daughters, and in educating the daughters. After all his four daughters had attained twenty-one or died, he bequeathed to his wife during widowhood £600 a year, and after her future marriage £200 a year. And if he should have any children by his then wife, he bequeathed to his wife in respect of each of such children who should for the time being be under twenty-one a further annuity of £150, to commence after all his said four daughters should have attained twenty-one or died, to be applied by his wife in maintaining and educating such children, and to be paid by equal half-yearly payments, the first of such payments to be made at the expiration of six calendar months from his decease. He gave his residuary estate among such of his children by both wives as being sons should attain twenty-one, or being daughters attain that age or marry, in equal shares, subject to a provision for making the share of each child by the second wife exceed the share of a child by the former wife by £3000. There was the usual clause of maintenance, subject to a proviso that the power of giving maintenance should not be exercised as to any child while the annuity bequeathed to his wife in respect of such child was payable, unless the trustees thought the annuity insufficient. At the testator's death several of the daughters by the first wife were under twenty-one.

Held, by *Jessel*, M.R., that the annuities of £150 became payable from the testator's death, and were not postponed till all the daughters by the first wife had attained twenty-one or died, on the ground that, having regard to the scope of the will, the former of the two inconsistent clauses was to be rejected rather than the latter, independently of the rule that of two inconsistent clauses in a will the latter is to be preferred.

Held, on appeal, that this was not a case of two inconsistent gifts, but of a gift of something to arise at a future time with a subsequent direction as to the time of payment which was inconsistent with the terms of the

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original gift, and that such subsequent direction could not enlarge the gift, but must be rejected as inconsistent with it.

Held, that evidence that the latter of the two clauses was left in the will by mistake, and contrary to the testator's express instructions, was not admissible.

R. T. BYWATER, by will dated the 11th of April, 1871, bequeathed to his wife, so long as she should continue his widow, and until all his four daughters by his late wife should have attained twenty-one, or died under that age, an annuity of £800, and in respect of each of such daughters who should for the time being be living and under the age of twenty-one years, a further annuity of £100, such amount to be employed by the wife in maintaining herself and his said daughters in a suitable home and position and educating his said daughters, and to be paid by equal half-yearly payments, the first of such payments to be made at the expiration of six calendar months after his decease. Provided that if the shares of his said daughters under the will of their grandfather should be paid to his wife as their guardian or otherwise for their maintenance, then only so much of the annuities should for the time being be paid to his wife as would make up the amount which she would otherwise have received. And after all his said four daughters should have attained the age of twenty-one years or died under that age, he bequeathed to her so long as she should continue his widow an annuity of £600, and after her re-marriage, in case such event should happen, an annuity of £200 for her separate use, such annuity of £600 or £200 to be paid by half-yearly payments, the first of such payments to be made at the expiration of six calendar months from the period when such annuity should have commenced. The testator then proceeded as follows:—

"And in case I shall have any children by my present wife, I bequeath to my said wife in respect of each of such children who shall for the time being be living and under the age of twenty-one years, a further annuity of £150, to commence after all my said four daughters shall have attained the age of twenty-one years or departed this life, to be applied by my said wife in maintaining and educating such children, and to be paid by equal half-yearly payments, the first of such payments to be made at the expiration of six calendar months after my decease."

The testator directed his residuary estate to be held in trust for such of his children as being sons or a son should attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry, with a provision that the share of each child by his present wife should exceed the share of a child by his first wife by £3000; such £3000 not to be set apart in respect of each child entitled thereto till such child should attain the age of twenty-one, it being his desire that such children should not be entitled to interest in respect of such sum during their minorities in addition to the capital, the annual income of the whole of the trust premises for the time being unappropriated being held in trust for all his children for the time being under age, in equal shares. There followed a clause in the common form for maintenance and accumulation, subject to a proviso that the power should not be exercised with respect to each of his children so long as the annuity thereinbefore bequeathed to his wife for the maintenance and education of such child should be payable to her, unless the trustees thought the amount insufficient, in which case they might exercise the power and allow further sums for maintenance and education.

The testator died in January, 1874, leaving four daughters by his first wife, and two children by his second wife. His youngest daughter by his first wife was eight years old at his decease, and some of the four daughters were still living and under age.

The estate of the testator was being administered by the Court, and the widow took out a summons to obtain payment of two sums of £150 from the death of the testator in respect of her two children. The summons was adjourned into Court, and came on for hearing before the Master of the Rolls on the 28th of February, 1881.

T. A. Roberts, for the summons.

Gaselee, contrà, for the Plaintiffs.

Mounsey, for the trustees.

JESSEL, M.R.:—

To my mind this is a clear case. If I were compelled to resort

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to the rule of thumb, as I sometimes call it, that where there are two inconsistent clauses the latter shall prevail, that would give the applicant what she asks for. But I think the case may be decided without resorting to that extreme rule. The testator begins by giving to his wife during widowhood and until all his four daughters by his late wife shall attain twenty-one or die under that age, an annuity of £800, and in respect of each of such daughters who should for the time being be living and under the age of twenty-one years, a further annuity of £100, such annuities to be applied by his wife in maintaining herself and his said daughters in a suitable home and position. Up to this point there is no provision at all for the maintenance of his children by his then present wife. Then he proceeds to say that in case he should have any children by his then present wife, then he bequeaths to his wife, in respect of each of such children who should for the time being be living and under the age of twenty-one years, a further annuity of £150. Up to that point there would have been no question, but then he says, "to commence after all my said four daughters shall have attained the age of twenty-one years or departed this life, to be applied by my said wife in maintaining and educating such children"—that is, his children by his second wife—"and to be paid by equal half-yearly payments, the first of such payments to be made at the expiration of six calendar months after my decease." Now it is obvious what was the intention. First of all, he gives a number of annuities which he has appropriated for the maintenance of the second wife and the children by the first wife, and, according to the argument of the Respondents, the children of the second wife, as long as there is any child by the first wife under age, would go without maintenance altogether. Anything more absurd, when the testator most carefully provided for their maintenance, I cannot imagine. Of course, the children by the second wife require maintenance while they are under twenty-one. They are his own children, and he gives the annuities of £150 each expressly for their maintenance. The whole thing is consistent if the words "to commence after all my said four daughters shall have attained the age of twenty-one years or departed this life" are treated as put in by mistake. When we come to the disposition of the residue, he gives each daughter who attains twenty-one an absolute interest in her share, and he directs the income for the time being unappropriated to be held upon trust for all the children, and the children by the second wife are to have something more in the shape of provision to put them on an equality with the children of the first wife, because he considered that the four daughters of his late wife would derive a considerable interest in some property belonging to their mother. It would not be equality to have the children by the second wife go without maintenance until the children by his first wife attained twenty-one. The slip is in the first part. Without resorting to the rule to which I have alluded, it is obvious, upon a fair construction of the will, that the slip has occurred in the earlier and not in the latter part of the clause. I was addressed with some force by the learned counsel on the ground that in holding this I should be mutilating the will; but it is no mutilation of a will to determine by reference to the context which of two inconsistent clauses is to prevail.

The only other argument I need mention is a very extraordinary one, and that is, that the declaration that the first payments of the annuities should be made at the expiration of six calendar months after the testator's decease was not inconsistent with the commencement of the annuity after the decease of the four daughters, because that event might happen in the testator's lifetime. The answer is, that, no doubt, is possible, but it is not what the testator contemplated. He has made the most anxious provision for the maintenance of his daughters by his late wife while they are minors after his death, and it shews that he contemplated that the event of his dying soon was one likely to happen, and he cannot be supposed to have contemplated such an event as that they would all attain twenty-one in his lifetime. It is impossible to treat the two clauses as otherwise than inconsistent, and for the reasons I have given I consider that the latter ought to be preferred.

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One of the residuary legatees appealed. The appeal came on to be heard on the 13th of April.

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Roxburgh, Q.C., and *T. A. Roberts*, for the Appellant:—

We ask leave to adduce evidence that the words "the first of such payments to be made at the expiration of six calendar months after my decease" were inserted by a mistake in copying the altered draft of the will, and in opposition to the testator's express direction. In *Williams* on Executors (1) it is said that "where these two conditions are satisfied, 1. some absurdity or ambiguity on the face of the will ascribable to something either omitted or inserted, and 2. clear and satisfactory proof that the insertion or omission was contrary to the intention of the testator, the Court is at liberty, and even bound, to pronounce for the will, not in its actual state but with such error first reformed or corrected either by the insertion of the passage omitted or by the omission of that inserted."

[JAMES, L.J.:—That must be done by the Court of Probate.]

On a question as to real estate the Court will act on the same principles as the Court of Probate would act as to personalty.

[COTTON, L.J.:—The testator may have read his will in the actual form and have been satisfied with it.]

The case of *Re Duane* (2) supports the proposition of Justice *Williams*. The evidence is clear that the testator did not mean the annuities to commence at his death, and wrote to that effect on the draft.

JAMES, L.J.:—

It is impossible for us to admit the evidence.

BRETT and COTTON, L.JJ., concurred.

Then we say that even taking the words as they stand the decision of the Master of the Rolls cannot be supported. The testator gives annuities to commence after his four daughters have attained twenty-one or died. Until that time there is no gift, and the gift cannot be enlarged by the subsequent words, which would apply if the testator lived till his four daughters attained twenty-one. The will, on our construction, is perfectly sensible, for the

(1) 7th Ed. vol. i. p. 357.

(2) 31 L. J. (P. & M.) 173. 8 Jur N.S. 752.

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widow had a large annuity in respect of each of the four daughters. When those annuities cease the annuities for the children of the second marriage commence. If they have annuities at the time of the testator's death, then the first payment is to be made within six months after his death. The trustees had power to allow maintenance, which takes away the force of the observation of the Master of the Rolls that the widow would have nothing with which to provide for her own children if the annuities provided for them did not commence at once.

Gaselee, contrà :—

The testator provides that the first payment of the annuity of £600 or £200 is to be paid at the expiration of six calendar months from the time when such annuity shall have commenced, which shews that he knew how to use proper language where an annuity was to commence at a future period. Then as to the scheme of the will, the testator gives the widow £800 a year while she is a widow, and any of the four daughters are under twenty-one. The youngest of the four daughters having been seven years old at the testator's decease, it might have been fourteen years before the annuities of £150 could commence according to the Appellant's construction. If the widow had married during that period she would have been left with nothing but £200 a year, and with no provision for the maintenance of her children by the testator. The Appellant's construction therefore produces an unreasonable result, and there is no reason for departing from the rule that of two inconsistent clauses in a will the later is to prevail. The language of the maintenance clause assumes that there will be an income which can be applied, which would not be the case unless these annuities are payable *pari passu* with the other annuities, for the other annuities exhaust the income. It is probable, as suggested by the Master of the Rolls during the argument, that the word "commence" was put by mistake for the word "continue," and that the testator's intention was to provide that the annuities of £150 should not cease on the four daughters attaining twenty-one. The case of *Pasmore* v. *Huggins* (1) supports the Respondent's contention.

(1) 21 Beav. 103. 1 Jur N.S. 1060

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Mounsey, for the trustees.

Roxburgh, in reply:—

If the widow married again, and her income was reduced to £200 a year, a large income would be set free, and there would be ample means for the maintenance of the children.

JAMES, L.J.:—

I think that we ought not to affirm the decision of the Master of the Rolls in this case. The words are peculiar, and we have very great difficulty in construing them. The Appellant is entitled to have our decision upon the construction of the will, although we are overruling in a matter of doubt that which has been decided by the Master of the Rolls.

My view is this, that this is not a case of two inconsistent gifts, a gift of something in one clause and a different gift of the same thing in another clause, in which case, no doubt, the rule is that the latter clause, if a Judge can find nothing else to assist him in determining the question, is to prevail, as being the last expression of the testator's wish. This does not appear to me to be a question of that kind. It is not a question of difference between two gifts, but there is a gift and a direction how that gift is to be paid, which direction is inconsistent with the language of the gift itself. The question is whether that which is a mere direction as to the mode of payment is not to be struck out as a superfluous inconsistency and an inaccuracy, because the giving effect to it would alter entirely the nature of the gift and make the gift itself totally different from that which it purports to be. The testator has made a gift which is only to commence at a future event, and afterwards gives a direction as to the time of payment, which would make it commence at an earlier time. I think, under those circumstances, we must take the words of the gift as shewing what the gift is, and must strike out the direction as to the payment at some other time, as being repugnant to and inconsistent with the gift. The will, therefore, must be read as if the words "the first of such payments to be made at the expiration of six calendar months after my decease" were not there.

BRETT, L.J.:—

I agree with the conclusion of the Lord Justice *James* and with the reasons given for it.

COTTON, L.J.:—

I am of the same opinion, and for the reasons stated by Lord Justice *James*. Here we have a gift of a thing which is not to arise or to come into existence until a future period, and therefore the subsequent words must be disregarded, or rather, cannot have the effect given to them of enlarging the gift, or making the thing given arise at a time different from that which the words of the gift authorize. I think that is the reasonable construction of this will. The widow has given to her £800 a year, and then a further annuity, having regard to the number of the daughters of the first marriage, is given to her. When all those daughters attain twenty-one or die her annuity of £800 is cut down to £600, but the testator says, if at that time there are children by my second marriage, then I give her something in substitution for that which I have taken away, not £200 a year, but something which may amount to more than that—£150 a year for each of my infant children, if any, by my second marriage. He did not intend, in my opinion, during the time when the daughters of the first marriage, or any of them, were under twenty-one, that she should have in addition to the £800 a year this sum according to the number of the children of the first marriage, and there is a provision in the will for the maintenance of the children out of their shares of residue. We must have regard to what Lord Justice *James* has pointed out, and not increase or alter the thing given by a direction as to the time of payment.

Solicitors for Plaintiff: *Helder, Roberts, & Gillett.*
Solicitor for Widow: *G. B. Batchelor.*

H. C. J.

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May 7.

In re ——, AN ALLEGED LUNATIC.

Access to alleged Lunatic—Order for Visitors in Lunacy to see the alleged Lunatic—Inquiry in London as to State of Mind of Person in the Country.

A petition for an inquiry into the state of mind of an alleged lunatic having been presented, and disputes having arisen as to the terms under which access of medical witnesses should be allowed, the Court made an order that two of the visitors in lunacy should see the alleged lunatic and report to the Court.

The rule is not inflexible that an inquiry by a jury as to the state of mind of an alleged lunatic must take place near his place of residence, and there being reason to believe that a strong local feeling as to the proceedings existed in the neighbourhood where the alleged lunatic resided, the inquiry was directed to be held in *London.*

When the medical witnesses for the alleged lunatic had seen her alone it was held that they were not entitled to be present when the medical witnesses for the Petitioner saw her.

IN this case a petition was presented for an inquiry into the state of mind of Miss ——, alleged to be a lunatic, and was answered for the first petition day after the 9th of April, 1881. The Petitioner was the husband of the lady's sister, and the lady lived with the Petitioner and his wife at a house in the country.

On the 11th of April the Petitioner's solicitor wrote to the lady's solicitors in *London*, stating that two medical men named in the letter would attend at the Petitioner's house to see the lady at a specified hour on the 14th of April. The lady's solicitors answered by letter on the same day that as one of their medical witnesses would have to be present at the interview between the lady and the gentlemen named, the examination must take place in *London*, and they proposed an appointment in *London* on the 14th for that purpose.

The Petitioner's solicitor replied at once that it would be very inconvenient for the medical men to attend in *London*, and that it would not be fair to them to have one of the medical witnesses present during the interview. The writer went on to say that unless he heard from the lady's solicitors that the examination would be permitted without interference at the time and place mentioned in the first letter, an application would be made to the Lords Justices for an order giving proper facilities for the examination.

On the 12th of April the lady's solicitors wrote to say that they could not give a definite answer till they heard from their principals; that they could hold out no hopes of the Petitioner's medical men being allowed to see the lady except in the presence of her medical witnesses, and probably of a shorthand writer; and that they thought the examination must take place in *London*. Later on the same day they wrote again appointing a time and place in *London* at which the two medical gentlemen named by the Petitioner could see the lady. The letter went on to state that no objection would be made to the Petitioner's solicitor seeing the lady, but that the Petitioner would not be allowed to see her or be present at the examination.

The Petitioner's wife strongly disapproved of the taking any proceedings in lunacy.

April 13. *Northmore Lawrence*, for the Petitioner, applied to the Court for directions as to access to the alleged lunatic.

[JAMES, L.J.:—How can we interfere with the lady's having another medical man present, and a shorthand writer if she chooses.

COTTON, L.J.:—There is no refusal by a third party to allow access to the alleged lunatic.]

It would be most inexpedient to have medical men on both sides and a shorthand writer present on such an occasion.

COTTON, L.J :—

I think we may make an order that two of the Lord Chancellor's visitors shall see the lady, and if any person interferes with their seeing her we shall know how to deal with the case.

JAMES, L.J.:—

It would be a contempt of Court for any one to interfere.

BRETT, L.J., concurred.

An order was accordingly made that two of the visitors of

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lunatics named in the order should, either together or separately, and at such time or times as they respectively should think fit, visit and examine the lady for the purpose of ascertaining the state of her mind and her competency to manage herself and her affairs, and that the said visitors should make a joint or separate report to the Court of the result of the examination, and state any circumstances relating thereto as they might jointly or severally think fit. And it was ordered that the said visitors should be respectively allowed to make such their visit or visits aforesaid either alone or jointly, and without the presence or interference of any person or persons whomsoever, or in the presence of such person or persons as the said visitors should respectively direct; and it was ordered that all and every person or persons whomsoever should be, and they were thereby restrained from interfering or causing to be interfered with, the said visitors in such their aforesaid visits.

On the 30th of April, the visitors having made their report, the usual order was made for an inquiry with a jury. The minutes directed that the inquiry should be held at the place of abode of the lady, or as near thereto as conveniently might be, and that a jury of the county and neighbourhood should be summoned. The lady had left the Petitioner's house, and gone to stay with a relative in *Sussex*.

May 7. *Chitty*, Q.C., and *White*, moved on notice that the minutes might be varied by directing the inquiry to be held in *London* instead of at the place of abode of the lady. They urged the great additional expense that would be occasioned by having it in the country.

Ince, Q.C., and *Northmore Lawrence*, for the Petitioner:—

The inquiry can be better conducted near the lady's residence, where the witnesses are known and the jury will be better qualified to judge of their credibility.

[Baggallay, L.J.:—I think that the case can be better tried by a jury who will not import local feeling into it.]

There is no evidence of local feeling in the matter, and the practice is settled that the inquiry should be held near the place of residence: *Ex parte Southcot* (1); *Ex parte Baker* (2); *Ex parte Smith* (3); *Re Jepson* (4); *Pope* on Lunacy (5).

BAGGALLAY, L.J.:—

It appears to me desirable that the inquiry should take place in *London*. I do not think that the greater expense of holding it in the country is of itself a sufficient reason for departing from the ordinary practice of holding the inquiry at or near the residence of the alleged lunatic. That practice, however, has not since the time of Lord *Eldon* been always followed, and there have been from time to time country cases in which the inquiry has been held in *London*. In the present case the feelings of the family are very much excited on the subject of the proceedings, and it is probable that such excitement in some degree extends to the neighbours. I will, however, consult my colleagues before finally deciding the point.

Ince, Q.C., and *Northmore Lawrence*, for the Petitioner:—

We also ask for a direction that our medical witnesses may be at liberty to examine the lady alone: *Re Princess Bariatinski* (6). The medical witnesses on the other side have had the opportunity of doing so.

Chitty, Q.C., and *White, contrà*:—

Our medical witnesses ought to be present, and this has been the usual practice.

BAGGALLAY, L.J.:—

Your medical witnesses have seen the lady alone, and the medical witnesses on the other side ought to have the same opportunity. I have consulted the other members of the Court (*James* and *Lush*, L.JJ.), and they agree with me that the inquiry ought to be held in *London*.

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(1) 2 Ves. Sen. 401.
(2) 19 Ves. 340.
(3) 1 Sw. 4.
(4) 2 Jur. 200.
(5) Page 68.
(6) 1 Ph. 375–379.

JAMES, L.J. :—

A jury from the immediate neighbourhood is the worst possible jury in a case where there is reason to believe that a strong local feeling exists.

Solicitor for Petitioner: *C. J. Mander.*
Solicitors for alleged Lunatic: *Letts Brothers.*

H. C. J.

C. A.
1880
V.-C. M.
April 8, 12, 13, 14, 17.

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May 9.

8 QBD 113
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CRAWCOUR *v.* SALTER.

[1878 C. 188.]

Bill of Sale—Act of Bankruptcy—"Order and Disposition"—Hiring Agreement —Evidence—Custom of Trade—Professional Confidence.

The Plaintiff lent furniture on hire to the Defendants, who were hotel-keepers, at a fixed sum to be paid by instalments, with a provision that until all the instalments were paid the property should remain in the Plaintiff, and if any instalment should not be paid when due the Plaintiff was to be at liberty to retake possession of his goods and the instalments to be forfeited, but upon all the instalments being paid the furniture to become the property of the Defendants. Upon one instalment being unpaid the Plaintiff put a man in possession of the furniture, and the Defendants executed an assignment of the lease of the hotel (which had been previously mortgaged to persons whom the Plaintiff had paid off) and of all their personal chattels and effects, including the hired furniture, to the Plaintiff, and afterwards became bankrupt:—

Held (affirming the decision of *Malins*, V.C.), that the hiring agreement did not operate as a bill of sale; that the assignment of the whole property of the Defendants, which was duly registered under the *Bills of Sale Act*, was an act of bankruptcy, but that the Plaintiff's furniture, not having been paid for, remained the property of the Plaintiff, and was not in the order and disposition of the bankrupt, and did not pass by the assignment; that the assignment was good so far as it was a mortgage of the leasehold, but was void so far as it was an assignment of the chattels as being an act of bankruptcy; and that the trustee in bankruptcy was entitled to all the personal effects of the bankrupt, but not to the hired furniture.

The custom of hotel-keepers holding their furniture on hire is now so well established that it ought to be taken judicial notice of.

Held, by *Malins*, V.C., that a solicitor employed to obtain the execution of a deed, and who is one of the witnesses, is not precluded, on the ground of a breach of professional confidence, from giving evidence as to what passed at the time of execution, by which the deed may be proved invalid.

ON the 28th of April, 1877, a lease for twenty-one years of the *Queen's Hotel, Ventnor*, was granted to *William Salter* and *Frede-*

rick J. Salter for seven, fourteen, or twenty-one years, at the rent of £350 for the first year, and £400 for the rest of the term. On the 9th of May, 1877, an agreement was entered into between the Plaintiff *Lewin Crawcour* and *William Salter*, under which *Crawcour* let and *W. Salter* hired the furniture contained in a schedule to the agreement for the purpose of furnishing the hotel. The amount to be paid by *Salter* was £125 on signing the agreement, and £35 on the 22nd of every succeeding month during the continuance of the agreement, and *Salter* was to give promissory notes as collateral security, without prejudice to the title of the Plaintiff to the furniture, but subject to the stipulation that in case of the furniture being seized and removed by the Plaintiff the promissory notes should become void. The Defendant *Salter* was to pay the rent of the hotel, and not part with any of the furniture or the hotel without the Plaintiff's consent. In case of non-payment of any of the said sums on the days appointed, or of breach of condition, or seizure or taking in execution of the furniture, the Plaintiff might enter, seize, and remove the same. On payment by the Defendant *Salter* to the Plaintiff of the full sum of £1321 15*s.* by the aforesaid instalments the furniture was to become the property of *Salter*, but up to such payment should remain the property of the Plaintiff. It was also provided that the said agreement should extend to any goods to be supplied in excess of the above amount, and such further goods should be paid for rateably with each instalment.

The goods were supplied according to the agreement, and the Defendant *Salter* thereupon paid the Plaintiff £125, and signed the promissory notes according to the agreement.

Subsequently to the above agreement further goods were supplied to *Salter* by the Plaintiff, making the total amount payable £1652 18*s.* 8*d.*, and promissory notes were given for the further amount.

The whole sum paid by *Salter* under the agreement up to the 7th of January, 1878, amounted to £380 15*s.* 6*d.* only, and there remained then due to the Plaintiff on an instalment the sum of £15.

On the 19th of September, 1877, *William* and *Frederick Salter* assigned the lease of the *Queen's Hotel* to *J. P. Rule* by way of security for £1000 advanced by him to the *Salters*, with a power of sale exerciseable at once in case of default in payment of the principal sum and interest.

On the 27th of November, 1877, the *Salters*, in consideration of a further sum of £250 advanced by *J. P. Rule* and *Head*, agreed to further charge the existing mortgage of the hotel, and to give a bill of sale of all the fixtures, fittings, and furniture therein, not comprised in the Plaintiff's inventory. After this the Plaintiff *Crawcour* paid off the two sums of money due to *Rule* and *Head*, and it was agreed between the Plaintiff and the *Salters* that the different sums paid by the Plaintiff for the Defendants, and the remaining sum due for the hired furniture, and the costs incurred, should all be consolidated into one debt and should be included in one security for £2657, with £5 per cent. interest, and should be assigned by way of mortgage to *R. Smith* as trustee for the Plaintiff.

Accordingly, by a deed dated the 7th of January, 1878, in consideration of the £2657, the *Salters* assigned the lease of the hotel by way of mortgage to *Richard Smith*, and they also assigned the goodwill of the business, and the stock-in-trade, fittings, and fixtures, and the furniture, goods, chattels, and effects in and about the hotel to *R. Smith*, subject to redemption on payment of the said £2657, with interest at £5 per cent., on the 10th of March, 1878, or earlier if demanded by the mortgagee. And the indenture contained a proviso that in the events therein mentioned it should be lawful for the mortgagee to enter, and, without further consent of the mortgagor, to sell the hereditaments and premises thereby assured.

At the time of the execution of this deed it was agreed that the deed should not be registered under the *Bills of Sale Act* until the expiration of eighteen days, and that a person should at once enter and remain in possession of the hotel and business, and the furniture and stock in trade, on behalf of the Plaintiff; and this was accordingly done, and the man remained in possession until the appointment of a receiver in this action on the 6th of June, 1878.

On the 12th of January following the execution of the above deed, *R. Smith*, the trustee for the Plaintiff, transferred the mortgage, and assigned the debt and securities to the Plaintiff.

Early in February, 1878, the Defendants *W.* and *F. Salter* commenced an action in this Court claiming to set aside the above securities, and notice of motion was given for the 15th of February for an injunction to restrain *Crawcour*, the Plaintiff in this action, from registering his mortgage under the *Bills of Sale Act*, but before the motion could be heard the deed was registered. This action was then commenced by *Crawcour* and his mortgagees, and shortly afterwards the Defendants the *Salters* became bankrupt. A receiver was at once appointed in the bankruptcy, and various applications were made to this Court as to the right of the receiver in bankruptcy to hold possession, and as to other matters connected with the carrying on of the hotel; but eventually a receiver was placed in possession by this Court, and the business of the hotel had ever since been carried on by him. Since the bankruptcy the action had been continued against the trustee in bankruptcy, *W. J. Richards*, who undertook to defend the action on behalf of the creditors. The Plaintiff claimed to have an account of what he had paid for rent and taxes and other outgoings in respect of the hotel and in defending his title to the mortgaged property, and an account of what was due to him on his security, and payment of the amount by the Defendant *Richards*, and in default of such payment that the mortgage might be foreclosed, and that other accounts might be taken of the costs incurred by the opposition to the possession of the receiver, and for payment of the amount to the Plaintiff. And if this Court should be of opinion that the furniture at the hotel was not effectually comprised in the Plaintiff's mortgage, then that due effect might be given to the provisions of the hiring agreement of the 8th of May, 1877, and that the Plaintiff might in that event be at liberty to remove the same from the hotel.

The evidence at the hearing was taken *vivâ voce*, and witnesses were called on each side to prove the various transactions which had taken place, particularly as to the period at which the goods belonging to *Crawcour* were first taken possession of by him—whether before or after the execution of the deed of the 7th of January, 1878—and whether the man in possession held actual possession of the goods as the apparent agent of the Plaintiff, or whether he was employed as the servant of the Defendants and was only in friendly possession.

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Witnesses were also called to prove that the Defendants had no property of value besides that which was comprised in the deed of the 7th of January, 1878, for, though the elder *Salter* had several houses in the *Isle of Wight*, they were mortgaged for more than they were worth.

A question of evidence was also raised as to the registration of the bill of sale. It appeared that the affidavit required under the *Bills of Sale Act* for the registration of the deed was made by *Herbert Crawcour*, the son of the Plaintiff, whose name was affixed to the deed as one of the witnesses attesting its execution. It was admitted that *Herbert Crawcour's* name was affixed to the attestation clause some days after the deed was signed, but there were two witnesses to prove that he was present upon the occasion; whereas the Defendants alleged that *Herbert Crawcour* was not present in the room when the deed was signed, and two witnesses were called who swore that *Herbert Crawcour* was not present, and a third witness stated that he could not be positive of the fact, but his conviction was that *Herbert Crawcour* was not present. That witness was *Bathurst Norman*, who at the time the deed was executed acted as the solicitor for the Plaintiff, but had since ceased to be employed as such solicitor.

His evidence was objected to by the Plaintiff on the ground that a solicitor acting on behalf of a client to procure the execution of a deed could not, on the ground of professional confidence, be called to prove the invalidity of that deed.

Upon the question of evidence,

Higgins, Q.C., and *J. Beaumont*, for the Defendant, the trustee in bankruptcy:—

The solicitor, Mr. *Norman*, was himself an attesting witness to this deed, and is therefore a proper witness to be called to give evidence as to the mode in which the deed was executed. But if he were not a witness he would be bound to answer any question of fact so long as there was no breach of professional confidence involved. In *Robson* v. *Kemp* (1) Lord *Ellenborough* held that an attorney who witnessed a deed was bound to disclose all that passed at the time of the execution of the deed. In *Brown* v.

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(1) 5 Esp. 52.

Foster (1) it was laid down that a solicitor who was a witness to a deed must state what took place when the deed was executed, and in *Ex parte Campbell* (2) the same principle was acted upon: *Taylor* on Evidence (3).

Glasse, Q.C., and *Stock*, in support of the objection:—

In the case of *Wheatley* v. *Williams* (4) the report contains this rule, that a solicitor cannot be compelled to give evidence whether a document is in the same state as when it was executed. If that is the rule of evidence, he cannot be called to state whether it was attested by three witnesses or only two; but here is a man who charges and is paid for procuring the due execution of a deed, and he is required to give evidence against his employer to prove that the deed is not a valid instrument. The rule laid down in *Brown* v. *Foster* does not extend to facts of which an attorney obtains knowledge during the transaction of his business.

Here Mr. *Norman* acquired the information he is now asked to disclose in his professional capacity, and he is now putting himself forward to defeat his own client in respect of a matter he was paid to complete. The information a solicitor acquires in his professional capacity cannot be disclosed to any one, more especially to his opponent.

There is no authority to shew that an attesting witness may be called upon to disclose what took place at the time of the execution of the deed in order to defeat it: *Greenough* v. *Gaskell* (5).

MALINS, V.C.:—

This question is one which, in my opinion, is immaterial to the result of the action, namely, whether *Herbert Crawcour* was present at the time of the execution of the deed, because the deed has been registered, and there is no clause in the *Bills of Sale Act* which requires the affidavit for registration to be made by an attesting witness. But the Defendants seem to have an idea that by proving that *Herbert Crawcour* was not there at the time of the execution they can vitiate the deed.

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(1) 1 H. & N. 736.
(2) Law Rep. 5 Ch. 703.
(3) 7th Ed. p. 789.
(4) 1 M. & W. 533.
(5) 1 My. & K. 98.

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In *Robson* v. *Kemp* (1) Lord *Ellenborough* says this: "It is very settled law that an attorney is not bound to disclose facts communicated to him by his client; but if an attorney puts his name to an instrument as a witness he makes himself thereby a public man, and no longer clothed with the character of an attorney. His signature binds him to disclose all that passed at the time respecting the execution of the instrument. . . . Every person who claims an interest in the property has a right to call upon the attorney as being the attesting witness." That lays down the rule that a solicitor is bound to disclose what takes place at the execution of a deed. Then *Ex parte Campbell* (2) is conclusive upon the point, because there the solicitor was held to be bound to disclose the place of residence of his client. I think my decision in *Ramsbottom* v. *Senior* (3) is also very much in point, and it proceeds upon the same principle.

Upon these authorities I feel bound to come to the conclusion that a client is not privileged to prevent his solicitor from giving evidence as to what persons were present at the time of the execution of the deed.

The main questions were then argued.

Glasse, Q.C., and *Stock*, for the Plaintiffs:—

In the first place we contend that the hiring agreement under which the furniture in the hotel was lent by *Crawcour* to *Salter* was not a bill of sale, and did not require to be registered under the *Bills of Sale Act*. The property remained the property of the lender until all the instalments should be paid. It was in the power of the lender to retake possession whenever any portion of one of the instalments was unpaid, and the Plaintiff did actually take possession upon one of the instalments being unpaid, and the furniture was never in the order and disposition of the Defendants. In the case of *Ex parte Crawcour* (4) there was a similar hiring agreement, and the hirer became bankrupt before all the money due under the agreement was paid, and it was there held that the hiring agreement was not a bill of sale, and that *Crawcour & Co.* were entitled to retake possession of their furniture, the hirer never having had any property in the goods. In *Ex parte National Guardian Assurance Company* (1), where the grantee of a bill of sale took possession of the goods, although no default in payment had been made, it was held that in order to exclude the operation of the reputed ownership clause a real possession, even though it be friendly, is sufficient, but to satisfy the *Bills of Sale Act* the possession must be apparent as well as real. In this case the possession taken by the Plaintiff was both real and apparent.

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(1) 5 Esp. 52.
(2) Law Rep. 5 Ch. 703.
(3) Law Rep. 8 Eq. 576, 577.
(4) 9 Ch. D. 419.

The custom of hiring furniture by hotel keepers is well known, and was considered to be established in the case of *Ex parte Powell* (2), and that this was sufficient to take the goods out of the order and disposition of a bankrupt.

The goods, therefore, which are lent on hire are not in the order and disposition of a bankrupt until he has paid for them.

Evidence has been given to shew that this bill of sale of the 7th of January, 1878, was not duly registered; but even if it were set aside, that would not give the goods to the trustee in bankruptcy if there were any other person who had a right against the bankrupt; and here the goods would belong to the Plaintiff whether there were a bill of sale or not: *Ex parte Leman* (3), and *Ex parte Payne* (4). The evidence as to registration shews that the deed was signed by two witnesses, and its being subsequently signed by a third witness is within the principle of *Shears* v. *Jacob* (5) and does not render the registration invalid.

Higgins, Q.C., and *J. Beaumont*, for the Defendant:—

Our first contention is that the bill of sale was not duly registered, and consequently that it is void. We have sufficient proof that *Herbert Crawcour* was not present when the deed was signed, and that he could not have been a witness to the execution. We do not say that the person making the affidavit for the purpose of registration must be an attesting witness, but that the affidavit must be a true statement of the facts, and one requisite statement

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(1) 10 Ch. D. 408.
(2) 1 Ch. D. 501.
(3) 4 Ch. D. 23.
(4) 11 Ch. D. 539.
(5) Law Rep. 1 C. P. 513.

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is the names of the attesting witnesses. The affidavit states that *Herbert Crawcour* was one of the witnesses. It is admitted that his name was added after the day of execution, but, without disputing the legality of that act, our evidence goes to shew that he was not in the room at the time the deed was signed, and therefore we say that the true facts not being stated in the affidavit, the registration is invalid: *Brodrick* v. *Scale* (1). But a bill of sale is not a bar to the goods being in the order and disposition of the bankrupt, unless actual possession was taken under it. There must be public notice, and the possession must be obvious and apparent: *Pickard* v. *Marriage* (2); *Ancona* v. *Rogers* (3); *Ex parte Jay* (4).

Then we say that the bill of sale was an act of bankruptcy, as it included substantially the whole of the debtor's property: *Ex parte Foxley* (5); *Woodhouse* v. *Murray* (6); *In re Wood* (7); *Ex parte Fisher* (8); *Smith* v. *Cannan* (9); *Ex parte Hawker* (10); *Stansfeld* v. *Cubitt* (11); *Badger* v. *Shaw* (12); *Ex parte Payne* (13); *Ex parte Stevens* (14).

If the hiring agreement is established, then the whole of the furniture and other articles comprised in the bill of sale passed to the trustee in bankruptcy under sect. 15, sub-sect. 5 of the *Bankruptcy Act*, 1869, as being in the "possession, order, or disposition" of the *Salters* "by the consent and permission of the true owners"—the *Crawcours*. It is not sufficient that the bill of sale was registered, even assuming the registration to have been properly effected. *Ex parte Harding* (15) decides that goods comprised in a bill of sale entitling the grantor to continue in possession until default, remain, notwithstanding that the bill of sale is registered, in the reputed ownership of the grantor. That is also laid down in *Stansfeld* v. *Cubitt*, and *Bacon*, C.J., in *Ex parte Harding*, said there was nothing in your Lordship's decision in

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(1) Law Rep. 6 C. P. 98.
n 3/ (2) 1 Ex. D. 64.
(3) Ibid. 285.
(4) Law Rep. 9 Ch. 697.
(5) Ibid. 3 Ch. 515.
(6) Ibid. 2 Q. B. 634.
(7) Ibid. 7 Ch. 302.
(8) Law Rep. 7 Ch. 636.
(9) 2 E. & B. 35, 45. 17 Jur 911
(10) Law Rep. 7 Ch. 214.
(11) 2 De G. & J. 222. 4 Jur NS 395.
(12) 2 E. & E. 472. 6 Jur NS 377
(13) 11 Ch. D. 539.
(14) Law Rep. 20 Eq. 786.
(15) Law Rep. 15 Eq. 223.

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Ashton v. *Blackshaw* (1) or in *Ex parte Homan* (2) which was inconsistent with what he there decided, and that he had no intention of deciding that the registration of a bill of sale prevented the operation of the reputed ownership clause. In *Ex parte Leman* (3) the title of the trustee no doubt prevailed over that of the bill of sale holder, but the question was not one of order and disposition, and in that case the bankrupt was not a trader, as appears by the same case in the Court below, *In re Barrand* (4); and the order and disposition clause in the *Bankruptcy Act* only applies to traders.

In the case of *Ex parte Crawcour* (5), relied upon by the Plaintiffs, it was held that under the hiring agreement the property in the goods did not pass to the bankrupt till the payment of all the instalments, but upon the question as to their being in the bankrupt's order and disposition, the case was sent back to the Registrar for trial.

Glasse, in reply.

MALINS, V.C., after stating at some length the facts of the case, continued:—

Now, in order to put a proper construction upon the deed of the 7th of January, 1878, we must look at the position of the parties at the time. The *Salters* were in possession of this furniture supplied by Mr. *Crawcour* under the hiring agreement, and they were slightly in arrear of their payment, which gave *Crawcour* the option of taking possession, which option he was, of course, not bound to exercise. They were therefore in possession of the furniture supplied by *Crawcour* and they were successfully carrying on the business of the hotel. They were also in possession of such furniture and articles in the house as had not been supplied by *Crawcour*, and also of the stock-in-trade, whatever that was—wines, spirits, and anything else that was necessary for the carrying on of the business of an hotel, which had not been supplied by *Crawcour*.

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(1) Law Rep. 9 Eq. 510.
(2) Ibid. 12 Eq. 598.
(3) 4 Ch. D. 23.
(4) 3 Ch. D. 324.
(5) 9 Ch. D. 419.

This deed prepared by Mr. *Norman*, which was registered, makes the *Salters* assign to a Mr. *Richard Smith* who was the representative of *Crawcour* (and after all that has passed I have never heard any rational explanation why the property was assigned to *Smith* rather than to *Crawcour* himself, because a week afterwards there was an assignment by *Smith* to *Crawcour*); but this deed reciting the previous mortgages upon the lease, and the other things which were comprised in the contract between the *Salters* and a man named *Rule* of the 27th of November, 1877, reciting those mortgages, reciting the contract with *Crawcour*, and reciting the moneys which were due, makes the *Salters* assign to *Smith* everything they have in the world except their wearing apparel. The words are—"All that the goodwill and interest of them the said *W. Salter* and *Frederick James Salter* in the business of hotel keepers in or upon the leasehold hereditaments and premises comprised in the hereinbefore recited indenture of lease, and in the subsidiary business of an inn, hotel, or tavern-keeper, on, at, or in the same premises, and the beer, wine, and spirit licenses belonging thereto, and the full benefit and advantage thereof. And also all and every the stock-in-trade, trade fittings and fixtures belonging to the said business, and also all and singular the furniture, utensils, books, plate, linen, glass, china, ornaments, fixtures, musical instruments, articles of vertu, and other goods, chattels, and effects whatsoever, with the exception of the wearing apparel of the said *W. Salter* and *Frederick James Salter* now being in and about the said leasehold hereditaments and premises known as the *Queen's Hotel, Ventnor*, aforesaid, including the several particulars mentioned in the schedule hereunder written," and in the schedule is comprised, as I understand, all the furniture, including that which had been acquired from *Crawcour*. Therefore this deed operated as an assignment of everything they had in the world. Now, it was unquestionably the fact, as Mr. *Rhodes* no doubt explained to the *Salters*, that if this deed was registered it would be a death-blow to them, because directly a deed of this kind assigning every particle of property which a man has in the world to a particular creditor is executed, there being people always on the look-out for these registered bills of sale, it would immediately become known, and no one would give them credit, and therefore, commercially, this would be their death-blow if it was registered. But there was a contract or an arrangement that the deed should not be registered for a limited time. That seems to have been eighteen days. It would expire on the 26th or 27th of January. Now they ought to have known, and must have known, that if this deed was registered, it would not only be a death-blow, as I call it, to the *Salters*, but it would be most injurious to Mr. *Crawcour* himself, because that that deed was an act of bankruptcy there could be no doubt. It is thoroughly well settled that when a trader assigns all the property he has in the world to a particular creditor, for a past debt particularly, that is an act of bankruptcy, and prevents any property passing—that they ought to have known; but here were costs to be made—two enormous bills of costs for these transactions, and the preparation of the deed itself, a part of the contract with Mr. *Norman* being that these men, struggling with the want of capital and with the difficulty of carrying on this hotel, were to way £50 for the preparation of this deed, besides the stamps upon it. That is the kind of transaction by which men are ruined. Accordingly it seems that the *Crawcours* or their advisers were inclined to act very harshly towards the *Salters*, and that led to the *Salters* bringing an action in this Court on the 26th of January against *Richard Smith* and *Lewin Crawcour*, and on the same day an application was made to me for an interim order to restrain the registration of the deed; that application was made, it would seem, at a quarter to two o'clock, and I gave leave to move on the following Tuesday. It now turns out from the evidence of *Charles F. Mayhew* that on the day the motion was made he saw *Herbert Crawcour* and Mr. *Rubinstein*, who was then the *Crawcours*' solicitor, leave the Court, and he followed and watched them down to the Queen's Bench office, and the deed was then registered. Therefore the deed was, in fact, registered before any application was made to me at all.

Now upon this subject a great deal of contest has been raised, namely, that this deed was improperly registered, because the affidavit was made by *H. Crawcour* as one of the three attesting witnesses; they say there were only two attesting witnesses properly speaking, namely, Mr. *Norman* as representing the grantor,

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and Mr. *Rhodes* as representing the grantee, and that *Herbert Crawcour* was not present when the deed was executed. Certainly the manner in which Mr. *Herbert Crawcour's* name was added to the deed as attesting witness looks very suspicious, but it would seem, according to the evidence which he gave, that he told Mr. *Rubinstein*, who was, as I have said, the solicitor for the registration of this deed, that he had been present when the deed was executed, and Mr. *Rubinstein*, I suppose believing that statement, said, "You had better add your name as an attesting witness," which was accordingly done, and then, he being an attesting witness whose name appeared upon the deed, the deed upon his application was registered. Upon that subject I have had a great deal of contest; the evidence of no less than five witnesses has been presented upon that subject. Upon the whole, however, I feel inclined to come to the decision that *Herbert Crawcour* was present when the deed was executed, and had a right to add his name as an attesting witness, and that the deed was properly registered.

Now, presuming that this bill of sale was duly registered, then there was a learned and able argument citing many cases to prove that while the *Registration Act* of 1854 says that a deed not registered according to the provisions of that Act shall be void as against assignees in bankruptcy, still it is equally void although it was duly registered. It turns out that that is a subject which I have not had to consider for the first time, because in the case of *Ashton* v. *Blackshaw* (1) I stated my view of the law upon the subject. I have looked at it again, and I must say that I adhere now to every word I then said as to the law, namely, that when a deed is duly registered, all the property comprised in it is taken out of the order and disposition of the bankrupt; and I must add that to come to any other conclusion would have been wrong. Mr. *Higgins* has cited a very formidable authority, namely, the case of *Stansfeld* v. *Cubitt* (2), before Lords Justices *Knight Bruce* and *Turner*, and if they had decided differently in a case at all like the present I should have been bound by their decision, but I am satisfied that *Stansfeld* v. *Cubitt* went on peculiar circumstances, and that the decision has no application here. The bill of sale there was not executed until after the act of bankruptcy, and there were very peculiar circumstances attending it, and I cannot regard that as an authority for saying that a deed duly registered leaves the property as much in the order and disposition of the bankrupt as if it had not been registered at all.

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(1) Law Rep. 9 Eq. 510.

(2) 2 De G. & J. 222. 4 Jur NS 539

But now in order to consider the matter let us see what the law was before. In such a case as *Martindale* v. *Booth* (1), where a publican made an assignment of all his stock-in-trade, and all the property he had, and it was provided that he might remain in possession for one year until default was made, it was held to take the property out of his control. The very object of the *Registration Act*, 1854, was to prevent such transactions in bankruptcy in future having any operation, and the Act recites: "Whereas frauds are frequently committed upon creditors by secret bills of sale of personal chattels whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons to the exclusion of the rest of their creditors, for remedy whereof be it therefore enacted." Then it enacts that the deed shall be registered and that otherwise "such bills of sale shall, as against all assignees of the estate and effects of the person whose goods, or any of them, are comprised in such bill of sale under the laws relating to bankruptcy or insolvency, or under any assignment for the benefit of creditors of such person, and as against all sheriff's officers," and so on, "be null and void." Now, surely when the Act says that if not registered it shall be void, it cannot be void if it is registered. At all events, that is the view I took in the case I have referred to, and it is the view which I also take at the present time, and if I had nothing but my own decision to rely upon, I should be very much tempted indeed to come to that conclusion again, but I find among the authorities cited by Mr. *Higgins* himself a case of *Ex parte Leman* (2), in which the decision of the Court of Appeal proceeds entirely upon the same principle. This is the marginal note: "A bill of sale of chattels was executed but not registered. The mortgagor executed a second bill of sale of the same chattels

(1) 3 B. & Ad. 498.

(2) 4 Ch. D. 23.

to another person, which was registered;" therefore there was a contest between the first and the second bill of sale holders: but it was decided that the first bill of sale was inoperative, and that the second was good. Then the person claiming under the second bill of sale having duly registered it, and the grantor having become bankrupt, the question was whether the person claiming under the bill of sale or the assignee or trustee in bankruptcy was entitled to the goods comprised in the bill of sale. The marginal note goes on to say, "Held, affirming the decision of the Chief Judge, that the second mortgagee was entitled to such of the chattels as had not been seized by the first mortgagee before the liquidation." On giving judgment in that case, Lord Justice *James* says this: "In my opinion we have nothing to do with any questions between the first and second mortgagees. The only parties to the contention before us are the trustee and a person to whom the debtor, whom the trustee represents, assigned these goods by a bill of sale duly registered. By that assignment the goods were made the property of the assignee, and there is nothing in the *Bills of Sale Act* to take away his right. But for the decision of the County Court Judge, I should not have thought the question arguable." Lord Justice *Baggallay* concurred, and Lord Justice *Bramwell* said: "The argument of the trustee amounts to this: You, the second mortgagee, would have had a perfectly good title against me, were it not that there is another person who has no title against me. The existence of that person takes away your right as against me."

Therefore it is there formally decided that a person claiming under a bill of sale duly registered has priority to the trustee in bankruptcy, and has the whole of the property comprised in the bill of sale. That, therefore, I think, disposes of the objection as to the registration. If, therefore, this question turned upon nothing else than the registration of the deed, I should hold upon that authority, and it would be only bearing out what I myself decided in the case of *Ashton* v. *Blackshaw* (1), that the proper construction in the case of a bill of sale unregistered is that it remains absolutely void against the trustee in bankruptcy, but that a deed duly executed and registered under that Act is good as to the

(1) Law Rep. 9 Eq. 510.

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property comprised in it, provided the deed is not open to any other objection and does give an effectual title to the assignees of all the property which is included in it. I am very happy, however, to find that the doubt, if there ever has been any doubt upon it, has no application now, for by the *Bills of Sale Act*, 1878, c. 31, that doubt has been entirely removed; because it expressly enacts exactly as I decided in the case of *Ashton* v. *Blackshaw* (1), that the property included in a bill of sale does not remain in the order and disposition of the bankrupt. Therefore upon these grounds, if the deed had not been open to any other objection, I should have held that this deed, being duly registered, did protect all the property comprised in it as against the trustees in bankruptcy of the *Salters*.

Now, a very formidable objection has been taken to this deed, namely, that it amounted to an act of bankruptcy, because it is thoroughly established that where a trader makes an assignment to a particular creditor, for an antecedent debt, of all his property, that is an act of bankruptcy which prevents the deed passing any property. There has been a contention raised here as to whether the *Salters* by this deed passed all their property, and for the purpose of shewing that it did not, they have called a witness to prove that *Salter* the elder had a good many leasehold houses in the *Isle of Wight* which he had mortgaged in the month of May, 1877, for £3500, and that those houses had been estimated to be of the value of £3900, and that therefore there was a margin; but now it turns out beyond all possibility of doubt that these houses were not worth the money, and that the Benefit Building Society which lent the £3500 on the property had made a mistake, and all the witnesses called have concurred in stating the houses are not worth the money borrowed upon them, and therefore the equity of redemption which the elder *Salter* had in these houses is utterly valueless. The consequence is that this deed of 1878 was an assignment of every particle of property which the *Salters* had in the world except their wearing apparel.

Then Mr. *Higgins* and Mr. *Beaumont* cited a great many cases, and addressed me very ably, and they went fully into the question whether an assignment by a trader of all his property does or does

(1) Law Rep. 9 Eq. 510.

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not amount to an act of bankruptcy; and there can be no question whatever, that if a particular creditor does take an assignment of all his debtor's property, that assignment disqualifies the debtor from carrying on his business, because he has nothing to carry it on with. No one, of course, would give credit to the *Salters* after the registration of this deed, because it is plain that they had nothing to pay with, because every particle of property except their wearing apparel was included in this deed. Their credit was therefore gone, and if ever there was a case in which an assignment of all the property of a debtor would amount to an act of bankruptcy, I think this is the case.

Now the great leading modern authority upon that subject is the case of *Smith* v. *Cannan* (1), which was a decision of the Exchequer Chamber. In that case a farmer assigned all his property for the purpose of securing a particular debt, and the question was whether that was an act of bankruptcy, and the Court of Exchequer, affirming the decision of the Court below, decided that it was, and the reasons for their decision are given in this report. Lord Chief Justice *Jarvis*, Mr. Baron *Pollock*, Mr. Baron *Parke*, Mr. Justice *Cresswell*, and Mr. Justice *Williams*, all concurred in this decision, that the assignment being of all the property, disqualified the trader from carrying on his business, and was, therefore, an act of bankruptcy, and consequently that nothing passed by the deed.

The same point was decided in Equity in the case of *Ex parte Hawker* (2), where it was held that an assignment of all the property of the debtor was an act of bankruptcy, so that nothing passed. The marginal note of that case says this:—"A debtor executed as security for an antecedent debt of £1500 an assignment which included all his property of any appreciable value, except a pension of half-a-guinea a day," which is very important here because the pension was not an assignable property, but it was decided that the exception of a pension of 10*s.* 6*d.* a day did not prevent its being an assignment of all his property. "Held, affirming the order of *Bacon*, C.J., that as this pension would not pass to a trustee in bankruptcy, and could not be taken in execution by a creditor, it constituted no substantial exception from the assignment, which being an assignment of substantially the whole of the debtor's property, was an act of bankruptcy."

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(1) 2 E. & B. 35. 17/Jun 9/11

(2) Law Rep. 7 Ch. 214.

The same thing was decided in the case of *In re Wood*, reported in the same volume (1). I need not go through the cases. There are many others, and many of those cases have been cited in the course of the argument. They all go on the same principle and follow that decision, that an assignment by a debtor of all his property is an act of bankruptcy which prevents the property passing to the assignee unless there is something further, or, as Mr. *Beaumont* said, unless there is an equivalent; if there is an equivalent, for instance, if upon the occasion the assignee got a substantial advance of money to enable him to carry on his business, that would be an equivalent, and that would prevent its having this operation. On the present occasion there was no equivalent. There was something like £62 mentioned, but if there was £62 advanced, I am clearly of opinion that that would not be an equivalent, and therefore it falls within the cases which I have been referred to, and I am clearly of opinion that it was an act of bankruptcy, and being an act of bankruptcy nothing passes by it.

Then, taking the whole question into consideration, what is the conclusion to which I am bound to arrive? It is very material, in my opinion, to remember that under the hiring contract the property in the furniture, and it was substantially the whole of the furniture of the hotel, was in *Crawcour*, because I find that was decided in the case of *Ex parte Crawcour* (2), which was a similar case to the present, for the very same *Crawcour* was a party to that transaction, and Mr. *Glasse* says, and no doubt correctly, that precisely the same printed form of agreement was used there as in the present case. That was a much smaller transaction than the present. *Crawcour* let the furniture upon one of these hiring agreements, and there was the usual provision, the same as there is in this deed, that the hirer of the furniture should not be entitled to the furniture until the instalments had been paid. The furniture was delivered, and *Robertson* (that is, the hirer) gave his promissory notes for the amount. On the 9th of

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(1) Law Rep. 7 Ch. 302.

(2) 9 Ch. D. 419.

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January, 1878, he filed a liquidation petition, under which a trustee was appointed, who took possession of the furniture, which was then in *Robertson's* house. On the 19th of March, some of the monthly instalments being overdue, *Crawcour & Co.* seized the furniture. The Registrar held that the agreement ought to have been registered as a bill of sale, and that by reason of its non-registration it was void as against the trustee, and on this ground, without going into the question of order and disposition, he made the order asked for, granting a perpetual injunction to restrain *Lewin Crawcour & Co.* from interfering with the furniture, and therefore the assignee or trustee in bankruptcy, according to that decision, would have had the whole proceeds of the furniture, but *Crawcour* appealed, and the appeal was heard before the Master of the Rolls, Lord Justice *James*, and Lord Justice *Brett* (1). The Master of the Rolls in giving judgment says (2): "I cannot concur in the ground of the Registrar's decision. Whether it can be supported on other grounds will be a matter for discussion at a future time." Whether the Master of the Rolls there referred to the question of order and disposition, I do not know, because the question of order and disposition does not seem to have been gone into; and I confess I feel myself somewhat at a loss to see in this very case, for instance, where the owner of the furniture under this hiring contract puts it in the possession of the bankrupt, and it continues in his possession up to the day of his bankruptcy, although the property as between the hirer and the owner remains the property of the owner, how it was prevented from being in his order and disposition, there being no bill of sale. However, as I understand this decision, the Court of Appeal decided that the property had not passed from *Crawcour*, and that therefore he was entitled to it. "The Registrar rested the title of the trustee simply on this, that the agreement was a bill of sale, and that it was void as against the trustee because it was not registered. It appears to me that the agreement was not a bill of sale by *Robertson*, who is the person by whom a bill of sale must have been executed if it is to be hit by the *Bills of Sale Act*. *Robertson* never had any property in the goods. *Crawcour & Co.*, to whom they originally belonged, agreed to let them on hire to *Robertson* at a rent to be paid by instalments, with this further provision, that, until all the instalments had been paid, the property should remain in *Crawcour & Co.*, and that, if any instalment should not be paid when it became due, they should be at liberty to retake possession of their own goods, and the instalments already paid should be forfeited to them. That does not make the document a bill of sale executed by *Robertson*, or a license given by him to take possession of personal chattels as security for a debt. It is simply one of the terms of the letting for hire and conditional sale of the goods by *Crawcour & Co.* to him. When the liquidation petition was filed, some instalments of the rent being overdue, *Crawcour & Co.* attempted to take possession of their goods. It appears to me that they were entitled to do so, and that there was no reason for granting the injunction." Then Lord Justice *James* said that he was of the same opinion. Lord Justice *Brett* added: "It is said that this agreement contains a license by *Robertson* to *Crawcour & Co.* to take possession of his goods, and that it therefore amounts to a bill of sale within sect. 7 of the *Bills of Sale Act*. The only way, however, in which *Robertson* could have any interest in the goods, or any right to deal with them, was by virtue of the agreement itself. It is said that the agreement passed the property in the goods to *Robertson*, and that by it he at the same time mortgaged the goods to *Crawcour & Co.*, and gave them a license to seize them. The sole question therefore is, whether the property in the goods passed to *Robertson*. In my opinion the property did not pass by the agreement. To hold that it did would be clearly contrary to the expressed intention of the parties. Nor do I think that the property passed by the delivery of the goods, which was made in accordance with the agreement. In my opinion the property could not pass until all the instalments had been paid, and that has not been done yet."

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(1) 9 Ch. D. 419.

(2) 9 Ch. D. 423.

Now the question there was, whether the trustee in bankruptcy should have the property in the goods, or whether *Crawcour & Co.* should have them, and most unquestionably the decision was that *Crawcour & Co.* should have them. I cannot, therefore, suppose that the Court of Appeal, consisting of three Judges, sitting upon such an occasion as that, would have come to the conclusion they did if there was an insuperable objection, or that *Crawcour* should

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have had the goods, if ultimately they must have belonged to the bankrupt; therefore there is a decision that under such a hiring contract as this the goods were not in the order and disposition of the bankrupt, and that they did belong to the *Crawcours*, from whom they had been hired, and therefore I must take that as a decision that if the deed of the 7th of January, 1878, had not been registered, these goods would not have been in the order and disposition of the bankrupt; but I think all doubt is put at rest by the case which Mr. *Glasse* cited of *Ex parte Powell* (1). The marginal note says: "Where a custom of holding certain goods on hire is relied on to take the goods out of the order and disposition of a bankrupt, the custom must be one which the ordinary creditors of the bankrupt may be reasonably presumed to have known. Such custom may be proved either by reported cases, or by evidence of the custom as on a question of fact. On the bankruptcy of an hotel keeper a custom was alleged of hiring furniture for hotels. The custom was on slight, but uncontradicted, evidence considered by the Chief Judge (overruling the decision of a County Court Judge) to be sufficiently established, and on appeal, the Appellant having declined an offer to have the custom tried by a jury, the appeal was dismissed." Now what was the question there? Assuming the custom to prevail, assuming there was a valid hiring, the goods were claimed on the ground that they were in the order and disposition of the bankrupt. The decision is, that they were not within the order and disposition of the bankrupt, and that the persons from whom they were hired, and not the bankrupt, took the property; therefore, taking this case of *Ex parte Powell* in connection with the case I have just cited of *Ex parte Crawcour* (2), it seems to me that the meaning of them is that under these hiring contracts the property does not pass until the whole of the price has been paid, and that in the meantime the property is not in the order and disposition of the bankrupt. Therefore, upon these authorities, I come to the conclusion that had it not been for the deed of the 7th of January, 1878, this property would have remained the property of the *Crawcours*, and would not have been in the order and disposition of the bankrupt. But then upon the whole transaction

(1) 1 Ch. D. 501.

(2) 9 Ch. D. 419.

what is the effect of the deed of the 7th of January, 1878? Mr. *Higgins* and Mr. *Beaumont*, for the trustee in bankruptcy, say that this deed included the whole of the property of the bankrupt, and therefore it included all that belonged to *Crawcour*, and *Crawcour* has chosen to alter his position; for while under the hiring contract of the 9th of May, 1877, the *Salters* had three years in which to pay the price for the furniture, he now chose to take a security which gave him a right to seize the property at the expiration of two months. The 11th of March, I think, was the day fixed on, but, however, I am bound to put a strict construction upon these transactions, particularly where the trustee, Mr. *Richards* has, I think, no merits. He claims here merely by the strict right of order and disposition. He is, I must say, a very litigious trustee, and a trustee who has put the Court to a great deal of trouble and raised points which were not worth raising. However, he must have his strict rights, and I will, as far as I can, give each party their strict rights.

Now, the case is not free from difficulty, but on the whole, looking at the nature of the transaction, it appears to me that this deed of the 7th of January, 1878, assigning all the property of the *Salters*, did not assign that property which was not theirs, and the property comprised in the hiring contracts, according to the decision I have referred to, could not be their property until all the instalments had been paid. It is very true that this furniture is scheduled, but the terms of the deed state that it is meant to assign all the property belonging to the *Salters*, and this property did not, in my opinion, belong to them. According to the decision I have cited of *Ex parte Crawcour* (1), and the other cases to which I have already referred, the property did not pass by the deed. It remained in *Crawcour*, and I do not think it was the intention of this deed that *Crawcour* should relinquish any rights that he had. On the whole, therefore, I come to the conclusion that the deed of the 7th of January, 1878, assigning all the property of the assignor, was an act of bankruptcy which prevented anything passing to the assignee. The consequence of that will be that *Richards*, the trustee in bankruptcy, will get all the property of the bankrupt which was

(1) 9 Ch. D. 419.

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not the property of *Crawcour*, that is, all the personal chattels which were strictly the property of the *Salters*. That will be all the furniture in the house which was not supplied by *Crawcour*, and all the fixtures, not being landlord's fixtures, which were not supplied by *Crawcour*, together with the stock-in-trade, such as it was; and the result will be that *Richards* may get enough to pay his costs, and *Crawcour* will retain the amount of his furniture, and the consequence is that there must be an inquiry as to which part of the property in the hotel was supplied by *Crawcour*.

Then, over and above that, this is a foreclosure suit, and there must be the usual foreclosure decree, and there will be an account of what is due to the Plaintiff.

As to the costs, what I have to say is, that there has been a divided success, and I shall therefore give no costs on either side.

The decree was in the following form:—

Declare that the indenture of mortgage dated the 7th of January, 1878, in the pleadings mentioned, but so far only as it purported to be an assignment by the above-named *William Salter* and *Frederick James Salter* of the goods and furniture in the *Queen's Hotel* not supplied by the said *Lewin Crawcour* and of fixtures, not landlord's fixtures, and of stock-in-trade in the said hotel, was an act of bankruptcy, and inoperative as against the above-named *William John Richards*, the trustee in bankruptcy of the said *William Salter* and *Frederick James Salter*, but that save as aforesaid the said indenture of mortgage was in all other respects valid and effectual; and declare that the said *Lewin Crawcour* as to the said goods and furniture supplied by him continued to be, and that the Plaintiffs *Robert F. Ward* and *William F. Ward* (the sub-mortgagees of *Salter*) are now entitled to the benefit of the hiring agreement of the 9th May, 1877, and to the property in and absolute possession of the furniture and goods supplied under the same agreement, subject as between the Plaintiffs *Robert Ward* and *William Ward* and the said *Lewin Crawcour* to any equity of redemption affecting the same. Consequential inquiry and accounts. Foreclosure decree as to leaseholds.

C. A. From this decree the Defendant, the trustee, appealed. The appeal was heard on the 9th of May, 1881.

Beaumont, for the Appellant, relied on the same arguments as in the Court below. He referred to *In re Wood* (1), *Smith* v. *Cannan* (2), and *Ex parte Powell* (3).

(1) Law Rep. 7 Ch. 302.
(2) 2 E. & B. 35.
(3) 1 Ch. D. 501.

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Glasse, Q.C., and *Stock*, for the Plaintiffs, were not called on.

James, L.J.:—

I am of opinion that we ought to affirm the decision of the Vice-Chancellor. First, as to the effect of the deed itself. The Appellant says that it was operative as establishing that the furniture supplied by *Crawcour* was the property of the bankrupts, but bad as against the trustee in bankruptcy. I cannot agree to that. The trustee cannot both approbate and reprobate the deed. I agree with the Vice-Chancellor that the deed was void as regards the furniture and other goods, which were really the property of the bankrupts.

Then as to the furniture supplied by *Crawcour* on hire, which is said to have been in the reputed ownership of the bankrupts with the consent of the true owner. The same question arose in *Ex parte Powell* (1). There the Chief Judge said that he would take judicial notice that this was the custom of the trade among hotel keepers. The Court of Appeal thought that the custom was not sufficiently well known to justify the Court in taking judicial notice of it, although there was some evidence that it was very common; but as the trustee declined to have an issue tried, the decision of the Chief Judge was affirmed. In the present case the Vice-Chancellor said he knew of the custom himself, and he did not require further evidence of it. We know ourselves that it is a very common practice. It is very common for hotel keepers to hire furniture in this way; and if it is the common practice it negatives the foundation of the rule in bankruptcy as to reputed ownership, that the person who has the goods obtains false credit by the possession of them. He does not in this case, because everybody knows that it is so common for a hotel keeper to obtain furniture in that manner. I do not believe that any one gives credit to a hotel keeper on the assumption that the furniture in his hotel is his own property.

Baggallay, L.J.:—

I am of the same opinion. I entirely agree with what the Lord Justice has said as to the custom of hiring furniture.

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(1) 1 Ch. D. 501.

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LUSH, L.J. :—

I am of the same opinion. The custom referred to is now so well known that I think the Court ought to take judicial notice of it. No person dealing with a hotel keeper ought to assume that the furniture belongs to him.

Solicitors for Plaintiff: *Dixon, Ward, Letchworth, & Weld.*
Solicitor for Defendants: *Yorke.*

T. W. G.
M. W.

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[1878 B. 384.]

Practice—Appeal by one of several Plaintiffs.

Two of the three trustees of a settlement brought an action to have the trusts administered under the direction of the Court. *Malins*, V.C., dismissed the action with costs. One of the Plaintiffs having declined to concur in an appeal, the other appealed alone.

The Court of appeal *held* that such an appeal was regular, and must be allowed to proceed; and, being of opinion that a sufficient ground had been shewn for asking the direction of the Court, a decree for administration of the trusts was made.

BY indentures of lease and release dated the 4th and 5th of November, 1805, made on the marriage of Mr. and Mrs. *Pearce*, certain lands were vested in *Tekell* and *Lushington* on trust for sale, and by a deed of the 5th of November trusts were declared of the proceeds for the husband and wife during their lives, and after the death of the survivor for the children of the marriage. The trustees sold part of the property and lent the purchase-money on mortgage to the husband. There was issue of the marriage one child only, a daughter, named *Emily*, who in 1831 married *H. C. Verbeke*. By a settlement of the 8th of July, 1831, made in contemplation of the marriage, Mrs. *Verbeke* assigned the mortgage debt and the proceeds of sale of the unsold part of the estates comprised in the settlement of 1805, subject to the life interests of her parents, to trustees upon trust for the husband and wife during their lives, and after the decease of the survivor upon trust for the children of the marriage as the husband and wife, or the survivor of them, should appoint, and in default of appointment for the children equally. There were three children of the marriage, all of them daughters.

In October, 1865, *Emily Ann Verbeke*, one of the daughters, married *E. H. Barlee.* In contemplation of the marriage Mrs. *Verbeke*, who had survived her husband, appointed one-third of the settled funds to *Emily Ann Verbeke*, and a settlement was executed of this share. At the time of the institution of the present action *S. Lawrence* and the Defendant, *W. D. Attwood*, were the trustees of this settlement.

In 1870 *Elinore Verbeke*, another daughter, married *Frederick Reed.* In contemplation of this marriage Mrs. *Verbeke* appointed one-third of the settled funds to *Elinore Verbeke*, and a settlement was executed of it. In 1871 the Plaintiffs *J. E. Beckett* and *F. W. Ward* were appointed trustees of this settlement.

In 1871 *Clara Verbeke*, the third daughter, went through the ceremony of marriage with *W. H. Valpy.* In contemplation of this marriage Mrs. *Verbeke*, by deed-poll of the 2nd of February, 1871, appointed the remaining one-third of the settled funds to *Clara Verbeke*, and a settlement of it, dated the 6th of February, 1871, was executed, of which the Defendant *H. F. V. Valpy* was the surviving trustee. It was shortly afterwards discovered that *Valpy* had a wife then living. On the 3rd of October, 1871, *Clara Verbeke* mortgaged her interest under the appointment in favour of *S. Gibbon.* On the 22nd of January, 1872, Mrs. *Verbeke*, alleging that she had been induced by fraud to make the appointment in favour of *Clara Verbeke*, appointed the same third share to *Clara Verbeke* for life, and after her death to Mrs. *Reed.*

By a decree in Chancery, dated the 13th of July, 1872, the Plaintiffs and the above-named *W. D. Attwood* were appointed trustees of the settlement of the 8th of July, 1831, in the place of the original trustees, and the unsold lands comprised in the settlement of 1805 were vested in them upon the trusts of that settlement.

Mrs. *Verbeke* died on the 2nd of June, 1878, and in the following month the Plaintiffs commenced this action against their co-trustee *Attwood*, *H. F. V. Valpy*, *W. H. Valpy*, three children

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of *W. H. Valpy* by a former marriage, in whose favour trusts had been declared by the settlement executed by *Clara Verbeke* in 1871, and *Clara Verbeke.* The statement of claim, after statements the effect of which is shortly given above, alleged that the agent of *Attwood* had given the tenants of the unsold estates notice to pay their rents to him and not to the Plaintiffs, and asked to have the trusts of the settlements of 1805 and 1831 carried into execution under the direction of the Court, and to have it declared who were entitled to the third share comprised in the two conflicting appointments of the 2nd of February, 1871, and 22nd of January, 1872; for an account of rents received by *Attwood;* for a receiver, if necessary; and for further relief. Mr. and Mrs. *Reed* were afterwards added as Defendants, and *Clara Verbeke* having been lawfully married to *W. H. Valpy* in 1879, the proceedings were amended by making her a party as his wife. The allegations of the statement of claim were not disputed in any material particular.

Vice-Chancellor *Malins* dismissed the action with costs, being of opinion that the statement of claim did not shew any question to have arisen as to which the direction of the Court was needed.

Beckett having declined to join in an appeal, *Ward* alone gave notice of appeal, serving it upon the Defendants and his co-Plaintiff *Beckett.*

Glasse, Q.C., and *Stock,* for the appeal.

Higgins, Q.C. (*Batten* with him), for *Attwood,* took the preliminary objection that an appeal by one of two co-Plaintiffs could not be heard. He contended that co-Plaintiffs could not sever, and that if an appeal of this kind were allowed the result might be that, though *A.* and *B.* were joined as co-Plaintiffs, *A.* might on appeal get a decree which *B.* wished not to be made. He referred to *Drake* v. *Symes* (1).

Locock Webb, Q.C. (*Beale* with him), for Mr. and Mrs. *Reed,* supported the objection. He distinguished *Jopp* v. *Wood* (2) on the ground that there a decree had been made.

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(1) 3 D. F. & J. 491. 7 Jur NS. 399

(2) 2 D. J. & S. 323.

Hemming, Q.C., and *M'Swinney* appeared for Mr. and Mrs. *Valpy*, and

Carson, for the trustees of their settlement.

Glasse, Q.C., for the Appellant:—

The Appellant could have brought this action alone, and if he is aggrieved by the order made it would be most unreasonable that he should be precluded from complaining of it because the other Plaintiff does not choose to concur. *Colvin* v. *Hartwell* (1) is in favour of the right of one of several Plaintiffs to appeal.

[BAGGALLAY, L.J., referred to the observations of Lord *Eldon* in *Cholmondeley* v. *Clinton* (2).]

That doctrine has not been treated as precluding such an appeal: *Seton* on Decrees (3).

[BAGGALLAY, L.J.:—It is there said that one of several Plaintiffs may appeal against his co-Plaintiffs. Does it follow that he can appeal as against the Defendants?]

Surely it is *à fortiori* that he can.

JAMES, L.J.:—

I am of opinion that the objection must be overruled. The Appellant says that he is injured by the order of the Vice-Chancellor, and that he has a right to appeal against it. I do not think this sufficiently answered by saying that some one else who has exactly the same ground of complaint does not complain. No injury is done to the Defendant by allowing such an appeal. It is true that he has only one Appellant to look to for costs instead of two, but that is no more than would have happened if the other Plaintiff had died, in which case, of course, the present Appellant could have appealed alone.

BAGGALLAY, L.J.:—

I also think that the appeal ought to be allowed to proceed. In a case where the Defendants may be prejudiced as to costs if

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(1) 5 Cl. & F. 484.

(2) T. & R. 107, 115.

(3) Page 1605.

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an appeal is brought by one of several Plaintiffs the difficulty must be met by an application for security for costs; but a party injured by an order ought not to be precluded from complaining of it because some one else will not join him.

LUSH, L.J., concurred.

The appeal accordingly was heard on the merits, and the Court reversed the order of the Vice-Chancellor, and made a decree for administering the trusts.

Solicitor for Appellant: *E. Letchworth.*
Solicitor for *Attwood: E. H. Barlee.*
Solicitors for Mr. and Mrs. *Reed: Bircham & Co.*
Solicitor for Mr. and Mrs. *Valpy: J. F. Smith.*
Solicitor for other parties: *F. Lamb.*

H. C. J.

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June 21.

FARROW *v.* AUSTIN.

[1875 F. 79.]

Practice—Appeal for Costs—Rules of Court, 1875, *Order* LV., *r.* 1—*Supreme Court of Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *s.* 49.

19 Ch D 18
20 Ch D 303
304-6
21 Ch D. 383.
24 Ch D 276

A married woman, who was one of the executors of a testator and also tenant for life of the residue, filed a bill for administration of the estate. Upon the accounts being taken it turned out that the residuary estate was insufficient for payment of debts and costs, and that it would be necessary to resort to specifically bequeathed property. *Malins*, V.C., on further consideration, refused to give the Plaintiff any costs of the suit, and ordered the next friend to pay the costs of taking an account of what, if anything, was due from another of the executors on an account current between him and the testator.

The Plaintiff appealed:—

Held, that as a residuary legatee or executor filing a bill for administration is entitled to costs out of the estate, unless some special grounds are shewn for depriving him of them, the costs in question were not costs in the discretion of the Court within the meaning of the *Supreme Court of Judicature Act*, 1873 (36 & 37 Vict. c. 66), s. 49, and that an appeal would lie.

H. C. HEATHER, by will dated the 8th of November, 1873, bequeathed a certain leasehold in which he carried on business,

And see Turner v. Hancock 20 Ch D. 303, C.A.

and the goodwill of the business, stock-in-trade, book debts, &c., to *Elizabeth Heather*, widow, absolutely, but subject to the balance of a running account between her and himself, which balance when ascertained was to form part of the residue of his personal estate. He gave the income of his residuary personal estate to the Plaintiff, Mrs. *Farrow*, for life, for her separate use, and after her decease to Mrs. *Heather* for life, and after the decease of Mrs. *Farrow* and Mrs. *Heather* to two other persons absolutely. He appointed Mrs. *Heather*, Mrs. *Farrow*, and *D. E. Austin* executors. He died on the 9th of April, 1875, and his will was proved on the 28th of May by all the executors.

In July, 1875, Mrs. *Farrow*, as tenant for life of the residue and executrix, filed her bill by her next friend against the two other executors for the administration of the trusts of the will.

On the 1st of June, 1876, the Plaintiff moved for a receiver. No order was made for a receiver, but by consent an order was taken for the common accounts of the testator's estate.

On the 31st of July, 1876, on the application of the Plaintiff, an account was directed of what, if anything, was due from Mrs. *Heather* to the testator's estate in respect of the running account mentioned in the will.

The accounts were taken, and it was found that the residuary estate was insufficient for payment of the testator's debts and the costs of suit, and that it would be necessary to have recourse to the specifically bequeathed property. A balance was found due to Mrs. *Heather* from the estate on the account mentioned in the will.

The cause came on for further consideration before Vice-Chancellor *Malins* on the 6th of July, 1880, when his Lordship made an order refusing to give any costs of the cause to the next friend of the Plaintiff. Directions were given to tax the costs of the Defendants as between solicitor and client, and to certify the amount of their costs incident to the order of the 31st of July, 1876, and the amount of their remaining costs. It was ordered that the next friend of the Plaintiff should pay the costs of the Defendants incidental to the order of the 31st of July, 1876; directions were given to get in a mortgage debt and pay the amount into Court, and liberty was given to the Defendants to

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apply for payment of their remaining costs and of the debts of the testator out of the fund in Court, and generally as there might be occasion.

The Plaintiff appealed from the whole of this order.

Higgins, Q.C. (*Bilton* with him), took the preliminary objection that this was an appeal for costs only.

W. Morshead, for the Plaintiff.

JESSEL, M.R.:—

According to the rules acted upon by Courts of Equity prior to the *Judicature Act*, a residuary legatee filing a bill for administration was entitled to costs out of the estate unless some special grounds were shewn for depriving him of them; and if he was also a personal representative, his *primâ facie* claim to costs out of the estate was all the stronger. This right is expressly saved by Rule LV. of the Rules of Court, 1875. The Appellant has a *primâ facie* right to costs out of the estate which can only be defeated by shewing some special grounds, and I consider that her costs do not come within the description of costs which are in the discretion of the Court.

BAGGALLAY and LUSH, L.JJ., concurred.

The appeal then proceeded, and the Court being of opinion that none of the grounds existed upon which a Plaintiff in an administration suit can be deprived of costs, struck out so much of the order as refused the next friend any costs and as directed the next friend to pay the costs of taking the account under the order of the 31st of July, 1876. The costs of the Plaintiff and Defendants as between solicitor and client were given out of the estate, and the Defendants were ordered to pay the costs of the appeal.

Solicitor for Plaintiff: *Frederick Jones.*
Solicitor for Defendants: *A. W. Sadgrove.*

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FRY, J.

March 25.

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May 13.

In re BROWN'S WILL.
In re BROWN'S SETTLEMENT.

Condition—Marriage with Consent—Guardians.

A testator appointed his wife sole guardian of his infant children, and bequeathed a legacy to each of his daughters on her attaining twenty-one or marrying with the consent of her "guardian or guardians," which should first happen. He gave the residue to his wife for life, and, after her death, gave a further legacy to each daughter who should attain twenty-one or marry with the consent "of her guardian or guardians." He empowered the trustees, during the minority of the daughters, to pay the income of their contingent legacies to his wife for their maintenance and education, and, in case of her decease, empowered them to apply so much of the income of the contingent legacies as they might think fit for the maintenance of the infant daughters presumptively entitled thereto, with power to pay it to the guardian or guardians of the daughters for that purpose. After the death of the wife, a daughter married under twenty-one without the consent of any guardian or guardians, there being none, and died shortly afterwards under the age of twenty-one years:—

Held, by *Fry*, J., and by the Court of Appeal, that the condition was not complied with, and that the daughter took no vested interest in the legacies—the condition not being made inoperative by there being no guardians, since guardians could have been appointed by the Court, and the testator, on the language of his will, must be taken to have contemplated such an appointment.

By the testator's marriage settlement the trust funds, after the death of the husband and wife, were to be held in trust for such children as, being a son or sons, attained twenty-one, or, being a daughter or daughters, attained that age or married with the consent of their parents or guardians:—

Held, by *Fry*, J., and by the Court of Appeal, that the same rule applied to this gift, and that the daughter took no vested interest.

Held, by the Court of Appeal, that the consent of a guardian appointed by the infant herself would not have satisfied the condition.

WILLIAM BROWN, by will dated the 19th of October, 1871, appointed his wife and two other persons his executors, and appointed his wife sole guardian of his children during their respective minorities. He bequeathed to each of his daughters *Sabina* and *Charlotte Emmeline*, upon her attaining the age of twenty-one years, or on her marriage with the consent of her guardian or guardians, which should first happen, the sum of £5000. He bequeathed his residuary personal estate upon trust

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to convert, and after payment of his debts and funeral and testamentary expenses and legacies, to pay the income to his wife during her life, and after her decease to raise and pay to each of his children (except his daughter *Constance*) who should survive him and have attained or should attain the age of twenty-one years, or in the case of daughters, should be or have been previously married with the consent of her guardian or guardians, the sum of £3000. Subject to a power of appointment given to his wife, the testator bequeathed the residue, after raising these sums of £3000, among his children who being sons or a son should attain twenty-one, or being daughters or a daughter should attain that age or marry (nothing being said about consent to the marriage), with a provision for the issue of children dying in his lifetime. He declared that if at his decease any of his children should be under the age of twenty-one years, or in case of daughters should be under that age and unmarried, his trustees or trustee should invest in their, his, or her names or name in manner therein mentioned the legacy or legacies to the payment whereof such child or children would upon attaining the aforesaid age or being married, as the case might be, be entitled, and might, during such suspense of absolute vesting, pay the dividends, interest, and annual produce of such legacy or legacies to his said wife for or towards the maintenance and education of the child or children respectively entitled thereto in expectancy, and, in case of the decease of his said wife, might pay and apply all or so much as they or he might think proper of the interest, dividends, and annual produce of such legacy or legacies, and of any other share or portion to which such child or children might be entitled in expectancy, for or towards the maintenance and education of such child or children, and might either themselves so pay or apply the same, or might pay the same to the guardian or guardians of such child or children without seeing to the application thereof.

The testator died on the 21st of October, 1871, leaving his wife and five children surviving. The will was proved by all the executors. The widow died on the 10th of March, 1874. On the 8th of April, 1880, *Charlotte Emmeline Brown*, then eighteen years of age, intermarried with *M. G. Dundas*, by banns, without the knowledge of her relatives. At this time there were no guardians of her person or property. The surviving executors thereupon paid into Court the sums of £5000 and £3000, to which she became entitled on her marriage supposing no consent to be requisite.

On the 28th of January, 1881, Mrs. *Dundas* died, being still under age, and her husband took out administration to her estate. *Charles Atherton Brown*, to whom these sums belonged on the supposition that she had not acquired a vested interest, now presented a petition for payment out to him.

The petition was heard before Mr. Justice *Fry* on the 25th of March, 1881.

Glasse, Q.C., and *Bagnold*, for the Petitioner:—

Here the daughter has married without any consent whatever, and the legacies of £5000 and £3000 have failed.

J. Pearson, Q.C., and *Tucker*, for the husband, *M. G. Dundas*:—

The condition imposed by the will had become impossible by the death of the only guardian appointed by the will; the daughter therefore took the legacies discharged from any condition: *Dawson* v. *Oliver-Massey* (1); *Green* v. *Green* (2). The testator's intention was that the money should not vest in a daughter unless she married or attained her majority, and the provision as to consent is merely directory. There is no case in which the consent of a person not named in the will has been considered necessary: *Clarke* v. *Parker* (3). It was a personal discretion: *Cole* v. *Wade* (4); *Worthington* v. *Evans* (5); *Grant* v. *Dyer* (6). He cannot be supposed to have thought the consent of some unknown person so essential. If the testator had made a gift over it might be different: *Doyley* v. *Attorney-General* (7). It is said that the infant might have had a guardian appointed; but in what way, and which is to be the proper guardian? It is said that there are ten sorts of guardians. Many are mentioned in *Harg.* notes to *Coke*, Socage (8). Some one must have given the infant away when she was married,

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(1) 2 Ch. D. 753.

(2) 2 J. & Lat. 529.

(3) 19 Ves. 1.

(4) 16 Ves. 27.

(5) 1 S. & S. 165.

(6) 2 Dow. 73.

(7) 4 Vin. Abr. 485.

(8) Note 70.

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and that person may for this purpose be considered the guardian. If it is said that the infant might have had a guardian appointed by the Court, such an appointment would have been a mere farce, as she would have selected any one whom she chose.

Holt, for the trustees.

FRY, J.:—

I need not trouble you to reply, Mr. *Glasse*.

In this case I have formed an opinion which I need not say may be erroneous, but certainly is very strong.

The testator appointed his wife the sole guardian of his children, and he gave to each of his daughters, *Sabina Henrietta Caroline* and *Charlotte Emmeline*, "upon her attaining the age of twenty-one years, or on her marriage with the consent of her guardian or guardians, whichever shall first happen, the sum of £5000." *Charlotte Emmeline*, whilst under age, contracted what has been described as a runaway match, and she has died before attaining the age of twenty-one years. She has, therefore, not satisfied either of the expressions contained in the will—attaining the age of twenty-one years, or marrying with the consent of her guardian or guardians. The question is whether she is nevertheless entitled to this legacy. In my judgment she is not; because as I conceive she is only entitled to it upon the happening of one or other of these two events.

Several arguments have been used to induce me to come to the conclusion that she is, nevertheless, entitled. In the first place, the case of *Dawson* v. *Oliver-Massey* (1) has been naturally and very properly pressed upon my attention. It is said that that is an authority which really concludes the question. In that case, the consent required was that of the parents, and one parent being dead, the Court said that by the act of God, and without the default of the legatee, the consent of parents in the plural had become impossible; and the Court by that decision, no doubt, intimated an opinion that if both parents had been dead the same result would have followed. That case, in my judgment, proceeds upon the principle that when the consent required is that of a

(1) 2 Ch. D. 753.

class of persons who, without the fault or default of the legatee, have ceased to exist, and cannot be brought into existence, the consent is not required, the act of God having rendered the consent impossible. That the case does not go in principle beyond this, appears to me to be clear from the reliance which the Lord Justice *James* placed upon the opinion of Mr. Justice *Story*, which he quoted at full length, and which is in part in these words (1): "Where a literal compliance with the condition becomes impossible from unavoidable circumstances and without any default of the party, it is sufficient that it is complied with as nearly as it practically can be, or as it is technically called *cy-près*."

Now, here the circumstances are by no means the same as in *Dawson* v. *Oliver-Massey* (2). Parents cannot be appointed by the child or by the Court; but the testator contemplated the possibility of there being guardians other than the sole guardian named in his will, the wife; and guardians or a guardian can be appointed by the child, and can be appointed by the Court; if, therefore, the child chooses to marry without the consent of a person whom she herself might bring into existence, it appears to me to be her own fault, or her own default, and that she is not within the principle of the case of *Dawson* v. *Oliver-Massey*.

In the next place, it is said that the will when looked at in its entirety throws a different light upon the meaning of these words, and shews that, although the testator described the marriage which was to precede the gift, as a marriage with consent, marriage was the main thing he looked to, and consent was, in his judgment, an immaterial or secondary matter. It becomes, therefore, important to consider what the testator has done in appointing his wife sole guardian, and giving this legacy in the terms I have mentioned. [His Lordship then read the material parts of the will, including the residuary bequest.] As a condition, therefore, in order to take a share of the ultimate residue he does not require marriage with consent. There being three cases in which he gives legacies to his daughters on marriage, in two of them he expresses that it shall be marriage with the consent of the guardian or guardians, which shall give the title, but in the third he is satisfied that the daughter shall take whether she marries with or without consent. This appears to me to strengthen and emphasise the expression, "with the consent of her guardian or guardians," in the cases where it occurs. The testator then goes on, no doubt, to provide for the maintenance of his children, and, referring equally to all the legacies, he provides that in the event of the child to whom a legacy has been giving being under twenty-one or unmarried, the income shall be applied so far as is necessary to the maintenance of the child, either by the trustees directly, or by paying the same to the guardian or guardians of such child or children. That is another indication that he contemplated the existence of guardians other than his wife, who was the sole guardian appointed by the will, though no doubt the testator has not actually dovetailed the conditions on which the power of maintenance arises with the previous gifts, because, in the event of a daughter marrying under age with consent, the maintenance clause could not apply, and she would have taken the fund.

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(1) Story, Eq. Jur. § 291.

(2) 2 Ch. D. 753.

It appears to me impossible to hold that the words requiring consent in the cases which I have referred to are to be struck out of the will, and the result of my investigation into the provisions of the will is, that I am confirmed in the conclusion that the testator desired the marriage on which the daughter was to take the legacy in question to be a marriage with the consent of the guardian or guardians, and that he did, I repeat, contemplate the existence of guardians other than his wife.

The next argument which has been adduced is this: It is said that a consent of this sort is a personal power, and so personal that it can only apply to the person named, and therefore, as Mr. *Pearson* put it, the consent to be given by the guardian or guardians is consent by the guardian named, that is to say, the wife. I am bound to say that this appears to me a totally untenable argument. That a man should say, "I allow the marriage to be with the consent of the guardian whom I appoint, and of guardians other than the one I appoint," and shall at the same time say that the consent of no other guardian shall avail, seems to me to be contradictory. The argument, therefore, cannot weigh with me.

In the next place, it has been said that it is impossible that a guardian other than the guardian named in the will could consent, and for this reason, that a guardian may be appointed either by the Court or by the infant, and unless you can see how the guardian is to be appointed, the consent of the guardian will not apply. I have attended with the best of my ability to that argument, and I am unable to follow it. What the testator has said is this, "I require that there shall be a guardian whose consent shall be given;" and although the infant might be able herself to appoint a guardian, or to get a guardian appointed by the Court, that does not affect the existence of the guardian. It only points out the abundant means which the infant had, and in respect of which she has made default, and has therefore intensified the default of which she has, so to speak, been guilty.

No doubt it may well be said that a young lady under age was not likely to know what she might do, or what her powers were as to appointing a guardian, and that to expect her to take that course is irrational and absurd. It appears to me the answer to that is this: In the first place, the testator has said that the guardian's consent is necessary; in the next place, if this young lady, instead of being minded to contract with another infant a runaway marriage, had been minded to contract a marriage with the consent of her friends, no doubt her friends would have put her in communication with a solicitor, or by some other means would have enabled her to do that which was an actual compliance with the terms of the will.

The result, in my judgment, is that the testator has required that a marriage to vest the legacy shall be a marriage with consent. That is not got rid of by the fact of the sole guardian having died, because other guardians might have been appointed, and the marriage that has been contracted is not one that vests any interest in the child. For these reasons, I must grant the prayer of the petition which asks for payment out to *C. A. Brown.*

Another petition came on to be heard at the same time for payment out of Court of a sum representing the presumptive share of Mrs. *Dundas* in the funds held on the trusts of the testator's marriage settlement. By the settlement it was declared that after the decease of the survivor of the husband and wife (subject to a

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power of appointment which was not exercised) the trust funds should be held upon trust for all and every the children and child, if more than one, of the marriage, who being a son or sons should attain the age of twenty-one years or die under that age leaving issue, or who being a daughter or daughters should attain the age of twenty-one years or marry with the consent of her or their parents or guardians, to be divided among the said children in equal shares as tenants in common, their respective executors, administrators, and assigns, or if there should be but one such child, then in trust for such one child, his or her executors, administrators, or assigns. No other part of the settlement was referred to as bearing on the construction of the requisition of consent to marriage. The presumptive share of Mrs. *Dundas* was paid into Court by the trustees in September, 1880, in consequence of the difficulty arising from the circumstances of her marriage. The petition was presented by the other children of the marriage or persons claiming under them. The case was treated as governed by the decision in the other petition, and an order made for payment to the Petitioners.

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The husband of Mrs. *Dundas* appealed from both orders. The appeal came on to be heard on the 11th of May.

J. Pearson, Q.C., and *C. Comyns Tucker*, for the appeal:—

The true construction of the condition is that the marriage of the daughter must be with the consent of "her guardian or guardians, if any;" as it was held in *Dawson* v. *Oliver-Massey* (1) that the consent of parents meant the consent of parents, if any. So, if the consent of "trustees" is required and one does not act, his consent is not necessary, and the consent of the acting trustee or trustees is sufficient: *Clarke* v. *Parker* (2); *Worthington* v. *Evans* (3); *Boyce* v. *Carbally* (4). Here the consent of guardians has become impossible by the act of God and without any default of the infant, and therefore it cannot bind her: *Collett* v. *Collett* (5). It is said that the infant could have appointed a guardian for herself, or one might have been appointed by the Court. But if this had been done, such guardian would have no power to give his consent, which was a personal confidence reposed in the particular persons named by the testator, and would not devolve on a guardian not appointed by him: *Attorney-General* v. *Doyley* (1); *Sugden* on Powers (2).

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(1) 2 Ch. D. 753.
(2) 19 Ves. 1, 15.
(3) 1 S. & S. 165.
(4) Ll. & G. Rep. t. Plunkett, 102.
(5) 35 Beav. 312. 12 Jur NS-150

An infant after fourteen can appoint a guardian of the person. In *Bridgman's* Precedents (3) there is a precedent of such an appointment. And the similar precedent, *Jarm. & Byth.* Conv. ed. *Sweet.* (4), shews the understanding of the profession. The note (5) states that such a guardian can give his consent to a marriage. In *Davidson's* Precedents (6) there is a similar form. The testator cannot have intended to impose a restriction which could be eluded in this way, for the young lady might have appointed the verger of the church, or even the intended husband. The Court, then, will lean to the view that the consent required is that of the guardians or guardian, if any. Again, in the events which have happened, we say that a valid marriage became the only condition, for the cases proceed on the principle that if all the persons whose consent is required are dead, consent will be dispensed with: *Graydon* v. *Hicks* (7); *Aislabie* v. *Rice* (8); *Grant* v. *Dyer* (9); *Green* v. *Green* (10); *Collett* v. *Collett* (11).

[BAGGALLAY, L.J.:—Are there any cases as to consent of trustees for the time being or guardians?]

Jones v. *Earl of Suffolk* (12) is the only case we have found as to consent of guardians, and it is very obscure. It is to be considered that a consent of guardians had become impossible, there being no guardian. It is true that guardians might be appointed, but we submit that there was no obligation to appoint them. *Booth* v. *Meyer* (before the Master of the Rolls on the 17th of November, 1877) carries out the principle of *Dawson* v. *Oliver-Massey* (13) and is in our favour.

(1) 7 Ves. 58, n.; S. C. 2 Eq. Ca. Abr. 194.
(2) 8th Ed. p. 256.
(3) Sweet's Ed. p. 248.
(4) Vol. ii. p. 560.
(5) Page 568.
(6) 2nd Ed. vol. v. p. 1077.
(7) 2 Atk. 16.
(8) 8 Taunt. 459.
(9) 2 Dow. 73.
(10) 2 J. & Lat. 529, 539.
(11) 35 Beav. 312. 12 Jur N.S. 180
(12) 1 Bro. C. C. 528.
(13) 2 Ch. D. 753.

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Glasse, Q.C., and *Bagnold*, for the Respondents, were not called upon.

JAMES, L.J. :—

This case has been very fully and ably argued, and I think that everything which could be said in support of the appeal has been urged by Mr. *Pearson* and by Mr. *Tucker*, to the latter of whom we are much indebted both for the substance and the form of his argument.

The real question before us is, whether the principle laid down by this Court in *Dawson* v. *Oliver-Massey* (1) can or ought to be applied to a case of this kind. That was felt to be at the time, and must be admitted to be now, a very strong decision. The Master of the Rolls, who is a great authority upon these questions of construction, considered in that case that the decision ultimately arrived at, and at which he was asked to arrive, was a direct violation of one of the first principles of English law. He considered that he was asked to hold that a gift upon a condition precedent could stand, though the condition precedent was not performed; and he said that he could not do so. In that case we proceeded in this Court upon a long train of authorities, extending over more than half a century. We considered that, having regard to these authorities, to the opinions of eminent text writers, and to the decision of an eminent Lord Chancellor of *Ireland* in *Green* v. *Green* (2), we were warranted in holding, if not bound to hold, that where the consent of parents was required, and one of the parents had died, the consent of the surviving parent was sufficient. That was what we had to decide, and that was the only point before us for decision. In the judgment delivered by me in that case I am reported to have said, that apparently the same principle would apply if both the parents had died. Mr. Justice *Fry*, in his judgment in this case, considers the logical result of the decision, that if one parent died the consent of the survivor was sufficient, to be that the death of both parents would dispense with the necessity of any consent. But it must be recollected what was the ground upon which we proceeded in putting upon the will a construction which it seemed to the Master of the Rolls impossible properly to put upon it. We thought, having regard to the nature of the case, the nature of the provisions the testator had made, and the purpose of those provisions, that he intended to require the consent of the parent or parents, if any, and that if there were none, then the condition had no effect. There was also this element in the case, that it was utterly impossible, by any mode whatever, to supply the want of a parent or parents. Mr. Justice *Fry* seems to me to have properly drawn the distinction that here there was no impossibility and no difficulty in regard to supplying a guardian or guardians. The testator contemplated throughout his will, and even in this very clause itself, that there should be a guardian or guardians appointed, because he appoints his wife, and her only, the guardian of the children, and does not go on to speak of daughters marrying with the consent of their said guardian, but, omitting all reference to the particular individual, he speaks of marriage with the consent of the guardian or guardians. After the death of his wife, he makes provision for the maintenance of the children, and provides that the allowance may be paid to the guardian or guardians, evidently contemplating that a guardian or guardians would be appointed in the ordinary course, and ought to be so appointed. That was the intention of the testator, and we must be guided by what we can see upon the face of the will to have been his intention. He intended that a daughter should not get her legacy till she was twenty-one, unless her getting it was accelerated by marriage; but undoubtedly, also, he intended, as a prudent parent would wish, to throw a safeguard around his daughters as to marriage, with a view to discourage a daughter who had just attained a marriageable age, from marrying any person who might make no provision for her, or an adventurer. I do not suggest that there was any misconduct on the part of the young gentleman in the marriage in this case. He seems to have been as young, if not younger, than the daughter, but the testator intended that there should be a safeguard thrown around his daughters by a provision requiring their marriages to be with the consent of a guardian or guardians—a consent which, so far from being impossible to obtain, was one which could easily have been obtained in the ordinary course by obtaining an appointment of guardians by the Court of Chancery. If we were to say that because nobody on behalf of the infant obtained a guardian, and the infant herself did not through her next friend obtain a guardian, therefore she was free to marry without that protection which the testator intended to throw around her, we should be entirely violating the plain intent and meaning of the testator, and should be sanctioning the doing that thing which of all others he intended not to be done.

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(1) 2 Ch. D. 753.

(2) 2 J. & Lat. 529.

Then it is said that the condition is substantially nugatory, because a guardian or guardians might be appointed by the infant herself. No case appears to have ever come before the Courts as to the power of a guardian appointed by the infant, but I do not think that the consent of a guardian so appointed would be within the meaning of the testator. He must be taken to have referred to the only guardians who are known to the law and the practice of the Courts of this country, namely, guardians duly appointed according to law by the Court of Chancery, which, as representing the Sovereign as *parens patriæ,* is the guardian of all infants who have means sufficient to enable the Court to act.

That being so, it appears to me that it would be an extension of the decision in *Dawson* v. *Oliver-Massey* (1), which proceeded entirely upon former authorities relating only to the death of a parent, to a case wholly beyond and outside its reasoning and principle, if we were to hold that the temporary non-existence of a guardian or guardians, which temporary non-existence could be supplied at any moment with the greatest ease and without detriment to anybody, would be equivalent to the death of the parent. Suppose there had been guardians appointed by the Court of Chancery, and that they had happened to die, it would be most unreasonable to hold that while proceedings were going on for the appointment of new guardians the infant could marry at once, without any consent, because there were no guardians at that moment in existence whose consent she could obtain. An infant under those circumstances would have to wait for the approbation of the Court. I may add, in conclusion, that I agree in the principle of the distinction drawn by Mr. Justice *Fry* between the case of guardians and the case of parents.

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(1) 2 Ch. D. 753.

BAGGALLAY, L.J. :—

I was a party to the decision in *Dawson* v. *Oliver-Massey* (1), the judgment in which was delivered by Lord Justice *James*, and in the course of that judgment he very fully explained the principles on which it proceeded, and commented on a long series of authorities which had been quoted in the course of the argument, and he has again to-day in the judgment he has just delivered adverted to the principles upon which that case was decided. I entirely agree with what he then said and with the further observations he has made this morning, and therefore upon that part of the case I do not think it is necessary to add anything more. I agree also in the distinction drawn by Mr. Justice *Fry* between the circumstances of that case and the present. In *Dawson* v. *Oliver-Massey*, the parent being dead it was impossible that any such consent as was required by the testator's will should ever be obtained, but such is not the case here. To my mind it is quite clear that the testator not only had present to his mind the probability that guardians would be appointed after the death of his wife if any of the children then remained under the age of twenty-one years, but intended that such appointment should be made. Not only do we find that there is a provision made for the original legacy of £5000 being paid to his daughter upon her attaining twenty-one or marriage under that age with the consent of the guardian or guardians, but we find the like provision with regard to the further legacy of £3000 which is given upon the death of his wife. In each case the condition is the consent of the guardian or guardians, and it is clear he could not have used the words "guardian or guardians," as has been suggested, viz., in a sort of conveyancing way, by putting the word in the plural as well as in the singular, because upon the death of his wife there would not remain any guardian appointed by himself, and in the provisions for the maintenance of the children after the death of the wife he empowers the trustees of the will for the time being to pay an allowance for the maintenance of the children to their guardian or guardians. Having regard to these circumstances, I think the distinction

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(1) 2 Ch. D. 753.

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drawn by Mr. Justice *Fry* was a very proper distinction, and I entirely concur in the view he has taken.

LUSH, L.J.:—

I fully concur in the judgments delivered by my colleagues in this case. It is plain that the object the father had in view was to protect his daughters from imprudent marriages while under age, and in order to carry out that purpose he began by appointing his wife sole guardian of his children during their respective minorities. Then he says, "I bequeath to each of my daughters upon their attaining the age of twenty-one, or their marriage with the consent of their guardian or guardians, whichever shall first happen, the sum of £5000." If he had said "with the consent of her said guardian," that would have referred to the mother, and then, according to the authorities cited (with which I need hardly say I entirely concur), as the mother died before the intended marriage, the performance of the condition would have become impossible by the act of God, and in that event the condition would have been considered as struck out of the will. But the testator does not confine it to "the said guardian." He had appointed his wife sole guardian. This legacy is given to the daughters upon marriage before twenty-one, provided the marriage was with the consent of the guardian or guardians. Therefore, in that part of the will he certainly assumes that a guardian or guardians will exist at the time when the daughters propose to marry. Of course, the duty of the guardian would be to protect the young ladies against an imprudent marriage, and to secure settlements for them. But that is not the only part of the will which bears upon the case. After giving to his wife a life interest in the residue, he provides that the trustees are, after her death, to hold the funds "upon trust to raise and pay to each of my said children (except my daughter *Constance*) who shall survive me and have attained or shall attain the age of twenty-one years, or in the case of daughters shall be or have been previously married with the consent of her guardian or guardians." He supposes, therefore, that his widow is dead, and yet that the daughter being under age is about to marry, and he requires that it shall be with the consent of her guardian or guardians, shewing that he assumes that a guardian or guardians will be appointed to carry out his object of protecting his daughters from imprudent marriages. Then, in the provision for maintenance, he authorizes the trustees after the death of his wife to pay the sums allowed for the maintenance and education of each child to the guardian or guardians of such child, again assuming that a guardian or guardians of the children will be appointed if they are infants after the death of his wife. Nothing can be more clear to my mind than that he intended throughout that a daughter, if she married when under age, should have the benefit of the advice of a guardian against committing an imprudent marriage, and in order to secure a proper settlement. It is, therefore, impossible to read this will without seeing that he contemplated that, as the children would have property, an application would be made to the Court to have guardians appointed, and although, as counsel have said, a guardian may betray his duty and consent to an imprudent marriage, that is not to be anticipated. Of course, the duty of the guardian when appointed by the Court would be faithfully to advise the young lady, and put his veto upon any marriage he thought was not for her benefit. It happens that this young lady died after the marriage, but before she arrived at the age of twenty-one, and she married without the consent of any guardian or guardians. Therefore she has not complied with the condition in the will, and never became entitled to the legacies.

Tucker then asked whether the decision of the Court applied to the settlement as well as the will.

James, L.J.:—

We are of opinion that Mrs. *Dundas* did not acquire a vested interest under the settlement. There are expressions in the will on which we have relied as fortifying the conclusion that the testator did not intend the legacy to vest in a daughter who married under twenty-one, unless she married with the consent of a duly constituted guardian or guardians; but we should have come to the same conclusion if the gift to a daughter on attaining twenty-one or marrying with the consent of her guardian or

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guardians had stood alone without any context to aid in the construction. Our decision, therefore, is the same on the settlement as on the will. I think that under the settlement, if only one parent had been living at the time of the marriage, the consent of that one parent would have been sufficient; but, there being no parent, the consent of a guardian or guardians was requisite. I may add that we are all of opinion that a guardian appointed by the infant herself could not have given an effectual consent.

Glasse:—The cases of *Ex parte Watkins* (1), *Re Woolscombe* (2), and *Curtis* v. *Rippon* (3), support that view.

Solicitors for Appellant: *Emmet, Son, & Stubbs.*
Solicitors for Respondents: *Simpson, Hammond, & Co.*

H. C. J.

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DICKS *v.* YATES.

[1879 D. 199.]

Practice—Appeal for Costs—Copyright in Title of Book—Trade-mark—Registration of Part of a Book.

The Plaintiff published in numbers, in a weekly periodical called "*Every Week*," a tale intituled "*Splendid Misery; or, East End and West End*," by *C. A. Hazlewood*. The Defendant subsequently commenced issuing in weekly parts, in a newspaper published by him, a tale by Miss *Braddon* intituled "*Splendid Misery*." The Plaintiff was registered as the proprietor of "*Every Week*" before the publication of it began, and after the tale had been completed he had himself registered as the proprietor of "*Splendid Misery; or, East End and West End*," giving the date of publication of the number of "*Every Week*" which contained the first number of the tale as the date of the publication of the tale. He then commenced an action to restrain the Defendant from continuing his publication of Miss *Braddon's* tale under the title of "*Splendid Misery*," and moved for an injunction. Before the motion was made the Defendant had altered the title of Miss *Braddon's* tale, and the motion was ordered to stand over till the trial, the Defendant undertaking not to alter the new title in the meantime. The tale was finished under the new title before the trial. It was proved that a novel which once had a large circulation had been published in 1801 under the title of "*Splendid Misery*," and that second-hand copies could still be met with. At the trial, *Bacon*, V.C., *held* that the Defendant had infringed the Plaintiff's copyright, and made an order containing no declaration of right, but simply ordering the Defendant to pay the whole costs of the action. The Defendant appealed, contending that the Plaintiff had no title, and that the action ought to have been dismissed:—

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(1) 2 Ves. Sen. 470.
(2) 1 Madd. 213.
(3) 4 Madd. 462.

Held, that it is not within the discretion of the Court to make a Defendant pay the whole costs of an action if the Plaintiff has no right to sue, that there was therefore implied in the order a declaration that the Plaintiff had a good cause of action, and that an appeal would lie:

Held, that though the registration of "*Every Week*" being made before any part of that periodical was published was not a good registration, the subsequent registration of the first number of the tale was a good registration to enable him to sue in respect of infringement of copyright in the title of the tale, supposing such copyright to exist:

But *held*, that the Plaintiff had no copyright in the title "*Splendid Misery*," for that copyright can only exist in something original, and the mere adopting as a title a hackneyed phrase, which moreover had been used as the title of a novel many years before, and which for anything that appeared might have been copied from that novel, could not give any copyright in that title:

Held, therefore, that the Plaintiff had no title to sue for infringement of copyright, and that as it was clear that the public could not be misled into purchasing the Defendant's tale under the belief that it was the same as that of the Plaintiff, so that there was no ground for the interference of the Court on the principles applicable to trade-marks, the action ought to be dismissed with costs.

Semble, that, as a general rule, there cannot be any copyright in the title of a book.

Weldon v. *Dicks* (1) considered.

THIS was an action for alleged infringement of copyright.

The Plaintiff was the publisher and proprietor of a weekly periodical called "*Every Week*," and was registered as such at *Stationers' Hall* on the 8th of June, 1869, which was some time before the publication of the first number. It was an illustrated work in penny numbers consisting entirely of fiction.

In 1874 the Plaintiff purchased from *C. H. Hazlewood* the copyright of a novel called "*Splendid Misery; or, East End and West End*," and published it in six parts in six consecutive numbers of his periodical, beginning on the 30th of December, 1874, and ending on the 3rd of February, 1875. The Plaintiff afterwards bound up these weekly issues with others, and sold them in a volume.

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(1) 10 Ch. D. 247.

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The Defendant was the proprietor of a sixpenny weekly newspaper called "*The World,*" in which he was in the habit of publishing serial stories in addition to the ordinary contents of a newspaper.

In or about July, 1879, the Defendant purchased from Mrs. *Maxwell,* commonly known as Miss *Braddon,* the right to publish in "*The World*" a novel of hers. She submitted to the Defendant several titles, and he chose the title of "*Splendid Misery*" as being the most appropriate. On the 30th of July, 1879, he commenced publishing it in weekly parts under that title in his newspaper. On the 25th of September, after nine numbers had appeared, the Plaintiff called at the office of the Defendant's publisher, and complained of the Defendant's using the title "*Splendid Misery,*" which the Plaintiff alleged to belong to himself. The publisher informed the Defendant of this complaint, and the Defendant on the same day wrote to the Plaintiff a letter putting him at arm's length.

The Plaintiff on the same 25th of September registered himself at *Stationers' Hall* as the proprietor of the copyright of "*Splendid Misery; or, East End and West End,*" by *C. H. Hazlewood,* giving the day of the date of the publication of the number of "*Every Week*" which contained the first part of that novel, as the date of publication. On the 27th of September, 1879, he commenced this action, claiming that the Defendant might be restrained from printing, publishing, or selling either in his newspaper or otherwise any story or publication with the title "*Splendid Misery,*" or with any title of which those words formed part, and from in any way using the words "*Splendid Misery*" as a title or description of any book or publication; and also claiming damages for the infringement of the Plaintiff's copyright in the book called "*Splendid Misery,*" and the title thereof.

A motion for an injunction was made on the 8th of October, 1879. The Defendant had in the meantime altered the title of his novel, and the motion was ordered to stand over till the trial, the Defendant, without prejudice to any question, undertaking not to alter the new title in the meantime.

Before the action came on for trial the Defendant had completed the publication of his novel under the new title. The

Defendant proved that the title "*Splendid Misery*" was not a new one, for that a novel under that name written by *T. Surr*, which was once of considerable note, had been published in *London* in 1801, and copies of it were still occasionally to be met with at second-hand book stalls. A copy of it was produced in Court.

The action came on for trial before Vice-Chancellor *Bacon* on the 9th of November, 1880.

Sir *H. Jackson*, Q.C., and *Whitehorne*, for the Plaintiff:—

As the registered owner of "*Every Week*," the Plaintiff is entitled to be protected against any infringement by the Defendant of his copyright in the title "*Splendid Misery*." It is objected that "*Splendid Misery*" is not an original title, inasmuch as a novel under that title, written by *T. Surr*, was published in 1801. But the Defendant, in taking that objection to the Plaintiff's title, has not complied with the requisitions of 5 & 6 Vict. c. 45, s. 16, by which, unless he specifies not only the name of the author or first publisher of the alleged work, or the proprietor of the copyright therein, but also the time when, and the place where, such book was first published, he cannot be allowed to give evidence at the trial that the Plaintiff is not the author or first publisher of the book in which he claims copyright: *Leader* v. *Purday* (1). There is copyright in the title, which is a material and valuable part of the book, within the definition contained in 5 & 6 Vict. c. 45, s. 2; and an injunction will be granted when the title, or any material portion of it, has been copied: *Weldon* v. *Dicks* (2); *Mack* v. *Petter* (3). In *Kelly* v. *Byles* (4) part only of the title of the plaintiff's registered copyright work had been taken. In *Maxwell* v. *Hogg* (5) the title in respect of which copyright was claimed was of a work which had not then been published, and the *dicta* of Lord *Cairns*, to the effect that copyright could not be acquired in a single word, although used as a fitting title for a book, were not necessary for the decision of the case, and cannot be taken as inconsistent with *Weldon* v. *Dicks*.

But as the Defendant has stated that he does not intend any more to use the title "*Splendid Misery*," the only question is as to the costs of the action, which has been rendered necessary by his conduct, and by his putting in a statement of defence and bringing the action to trial.

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(1) 7 C. B. 4.

(2) 10 Ch. D. 247.

(3) Law Rep. 14 Eq. 431.

(4) 13 Ch. D. 682.

(5) Law Rep. 2 Ch. 307.

Hemming, Q.C., and *Levett*, for the Defendant:—

It has not been shewn that any injury has resulted, or could result, to the Plaintiff's work by anything done by the Defendant. There is no attempt to prove that any person who has heard of "*Splendid Misery*" in "*Every Week*" would be deceived by the title into buying the "*World*," under the impression that the tale was the same. For the Plaintiff to succeed, he must shew that there has been a case of direct personation, or, at least, the *animus furandi:* the question in these cases being, "Did the defendant dishonestly pass off his work as the work of the plaintiff": *Metzler* v. *Wood* (1). As in trade-mark cases a name or label already appropriated to one class of goods may be afterwards applied to goods of a different class, *e.g.*, a name or mark though already appropriated for calico may afterwards be used by some one else for wine.

Applying the instance put by Vice-Chancellor *Malins* in *Weldon* v. *Dicks* (2), "Would any one be entitled to publish a book called '*Vanity Fair*,' leaving out the author's name? A person buying the cheap edition would expect to get *Thackeray's* work." No one could maintain that the illustrated paper called "*Vanity Fair*" was an infringement of *Thackeray's* copyright in the title of his novel. Therefore the Plaintiff can have no relief on the footing of trade-mark.

Then as to copyright: there is no copyright in a mere name or title: *Maxwell* v. *Hogg* (3); *Kelly* v. *Hutton* (4). In any case the Plaintiff is not entitled to relief, as it is shewn that he was not the first, as was the case in *Weldon* v. *Dicks* (5), to make use of this particular title for a novel, and his registration of the title is therefore invalid. This objection has been sufficiently taken by the statement of defence, without the necessity of giving a separate

(1) 8 Ch. D. 606, 810.
(2) 10 Ch. D. p. 263.
(3) Law Rep. 2 Ch. 307.
(4) Ibid. 3 Ch. 703.
(5) 10 Ch. D. 247.

notice under 5 & 6 Vict. c. 45, s. 16: *Hole* v. *Bradbury* (1); *Finnegan* v. *James* (2).

Sir *H. Jackson*, in reply:—

If, according to the decision in *Weldon* v. *Dicks* (3), the Plaintiff is entitled to copyright in the title of the book, as a material part of the book, then any infringement, however innocent, gives him the right to an injunction. We have never suggested any fraud on the part of the Plaintiff, but because in *Metzler* v. *Wood* (4) there was a distinct *animus furandi* on the part of the Defendant, it does not follow that there can be no relief against infringement of copyright where *animus furandi* is neither charged nor proved. *Surr's* novel has been long out of print, is quite forgotten, and only to be found occasionally in second-hand bookshops; and the fact that such a title was used for a novel in 1801 cannot prevent our reviving the title and acquiring a right in it.

BACON, V.C.:—

Nothing can be plainer than this, that under the statute a man who has assigned to him a copyright becomes the owner of that copyright, and if he desires to sue to establish his right in a Court of Law he must previously register it. But the evidence here is unquestionable that a certain Mr. *Hazlewood* wrote a novel, that he sold it to the Plaintiff Mr. *Dicks*, and that Mr. *Dicks* published it in what he called a serial publication, under the title of "*Splendid Misery*." There is nothing to impeach Mr. *Dicks*' title to a property so acquired and so dealt with. It is carried through the series of the magazine, or whatever it is to be called, and it comes to a conclusion, and then he proposes to publish it in a separate volume, a matter of no great importance; but it shews that he treated it as his property, and was preparing to make all the lawful use that an owner can of his property, whether consisting of a book or anything else. The matter so stands, and the Defendant purchases from Mrs. *Maxwell* a novel with a set of conjectural titles, and from them he selects the title of "*Splendid Misery*," and proceeds to publish it in parts in his own serial

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(1) 12 Ch. D. 886.

(2) Law Rep. 19 Eq. 72.

(3) 10 Ch. D. 247.

(4) 8 Ch. D. 606.

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publication. There was no wrong intention; nobody suggests anywhere that there was anything like a wrong intention on the part of anybody, either the writer or the publisher of the second publication. Then the Plaintiff thinks his property is being injured by the publication in the Defendant's newspapers of a work under the same title as that which he for a long time before—a considerable period—had been enjoying and using as a part of his property. Thinking that he might be damaged he makes a very reasonable request that the Defendant would cease his practice in that respect. How is he met? [His Lordship, after referring to Defendant's letter of the 25th of September, 1879, to the change in the title subsequently made by the Defendant, and to his disclaimer in the statement of defence of any intention to continue the use of the title "*Splendid Misery*," continued:—]

Now, I ask in the name of common sense, why was the action to go on after that? What possible reason was there? The Defendant might at once have desired to have the proceedings suspended. Nothing prevented his coming to the Court and saying, "Let there be an end of this litigation; I have acceded to the Plaintiff's demand: to a certain extent I have finished the publication; I have changed the title in some of the more recent numbers, and I never intend to use that title '*Splendid Misery*' again," and then there would have been a rational termination of the litigation. That does not suit the advice which the parties have received, and then it comes on in the shape of an action to be heard and determined, and then various points are raised. The first point that is raised is that the Plaintiff has no title. Now, admitting that *Surr's* novel was published in 1801—and so far as I have a right to import any knowledge of my own, it was a popular novel and a novel of considerable merit—a very long period has elapsed from 1801 to 1878 or 1879. Nobody pretends that there was any registration at the *Stationers' Company's* office or any other plain assertion or recognition of the title of *Surr*; that therefore dropped; it answered its purpose; it was at an end. When the Plaintiff or his writer, Mr. *Hazlewood*, had to choose a title, he chose, as he had a right to do, the title of "*Splendid Misery*." Could it be said that the title of a work is not a part of the work? It is not to be heard of for a moment.

If it is supposed that *Kelly* v. *Byles* (1) says anything against that, I beg entirely to dissent; it says no such thing. The title of a work is as much a part of the work as any other. It is more than any other part, because it is the distinctive part of the work. It is that which enables the persons dealing with it, buyers or sellers, to know what they are dealing with. Then, having acquired a copyright title, and having perfected it by registration, he is compelled to bring his action. I say compelled, because, if Mr. *Yates*' letter had been in more conciliatory terms, there would have been no necessity for any suit. I find that by law the whole copyright of "*Splendid Misery*" is vested in the Plaintiff, and that the title of it is no less a part of it than any other part. It has been invaded by the Defendant. It is unnecessary that there should now be an injunction. The Defendant having discontinued using the title, and having stated in his statement of defence that he has no intention of using it in future, there will be no other order than that the Defendant do pay the costs of this most needless and disagreeable action.

The judgment as drawn up contained no declaration of right, but simply ordered the Defendant to pay the whole costs of the action.

The Defendant appealed. The appeal came on for hearing on the 20th of May, 1881. C. A.

Higgins, Q.C., and *Whitehorne*, Q.C., for the Plaintiff:—

We take the preliminary objection that this is an appeal for costs only, and cannot be entertained. The suit had become abortive, and was brought to a hearing only for costs. There was nothing left but questions of conduct, and an appeal will not lie: *In re Hoskin's Trusts* (2); *Ashworth* v. *Outram* (3).

Hemming, Q.C., and *Levett*, for the Appellant:—

Our case is that the Plaintiff had no title, and that we were entitled to have the action dismissed. An appeal for costs is prohibited only where costs are the whole matter of the appeal. Here there is a judgment which is an authority in support of title to copyright such as is claimed by the Plaintiff. The Court has no discretion as to costs when it dismisses a demurrable bill. This case is covered by *Witt* v. *Corcoran* (1). There the order to pay costs could only be justified by holding that there had been a contempt. So here the order on the Defendant to pay the whole costs of the action cannot be justified unless the Plaintiff had a title to sue. The judgment, therefore, involves an implied declaration of right, and is the subject of appeal.

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(1) 13 Ch. D. 682.

(2) 6 Ch. D. 281.

(3) 5 Ch. D. 943.

Whitehorne, in reply:—

The stringency of the rule that there is no appeal for costs is strongly exemplified by *Harris* v. *Aaron* (2). A decision against us on this point would amount to a decision that in no way can a defendant who succeeds so conduct himself as to be liable to pay costs. The Court can do justice as to the costs of a litigation which has been rendered abortive by the conduct of the defendant, and he has no right to call for a decision on a hypothetical right, which, if ever it existed at all, ceased to exist before the hearing.

JESSEL, M.R.:—

I think that this objection cannot prevail. The whole costs of the action are ordered to be paid by the Defendant to the Plaintiff. The Defendant says that the Plaintiff had no title whatever to sue him, and he appeals on that ground, asking that the action should be dismissed. Now, if a plaintiff has no title, are the costs of the action in the discretion of the Court, so that the Court can give the whole of them to the Plaintiff? It seems to me that they are not. No one has ever heard of a defendant being ordered to pay the costs of a plaintiff who has failed to make out any title, nor did the Vice-Chancellor intend to make any such order. He decided that the Plaintiff had a title, and thereupon ordered the Defendant to pay the costs of the action, and that decision that the Plaintiff had a title is what is really appealed against. It seems to me that it makes no difference whether a declaration that the Plaintiff had a title is expressed in the order, or is a

(1) 2 Ch. D. 69.

(2) 4 Ch. D. 749.

necessary inference from the form of the order. In either case there is a decision that the Plaintiff was entitled to bring the action, and an appeal from such an order is not a mere appeal for costs.

I wish not to be supposed to go further than I intend. I think that the Court has a discretion to deprive a defendant of his costs though he succeeds in the action, and that it has a discretion to make him pay perhaps the greater part of the costs by giving against him the costs of issues on which he fails, or costs in respect of misconduct by him in the course of the action. But a judgment ordering the Defendant to pay the whole costs of the action cannot, in my opinion, be supported unless the Plaintiff was entitled to bring the action. Therefore, I think that the appeal should proceed.

James, L.J. :—

I am of the same opinion. I should add that there is an essential difference between a plaintiff and a defendant. A plaintiff may succeed in getting a decree and still have to pay all the costs of the action, but the defendant is dragged into Court and cannot be made liable to pay the whole costs of the action if the plaintiff had no title to bring him there.

Lush, L.J., concurred.

Hemming, Q.C., and *Levett*, for the appeal :—

There was no good registration of the Plaintiff's novel so as to entitle him to sue. The registration of his periodical is invalid, having been made before the publication of any part of it. Neither is the registration in September, 1879, a good registration, for it was a registration only of one part. The date of publication given was that of the publication of the first part, which contained a portion of the novel, and the description of the book as registered is not "the first part of '*Splendid Misery*,'" but "*Splendid Misery*," which as a whole was not published on the day stated, and the other parts had been published before the registration. The tale as a whole, therefore, is not protected. But supposing there was a good registration, what title has the

Plaintiff to sue? We say there cannot be copyright in a title: *Maxwell* v. *Hogg* (1). But if there can, at all events it can only exist where there is something original in the title, the very foundation of copyright being mental invention: *Copinger* on Copyright (2). Here the title is in no sense original, for it was used by *Surr* so early as 1801. The title of the Plaintiff's novel may have been borrowed from *Surr's*. There is no evidence that it was not, but if it was not there is no invention in such a common-place title as "*Splendid Misery.*" If we had used the title of the Plaintiff's tale so as to pass off ours as his, he would, no doubt, have had a title to relief on the ground of trade-mark, not of copyright; but no case of that kind is or could be made, and the Plaintiff stands upon copyright alone.

Higgins, Q.C., and *Whitehorne*, Q.C., *contrà*:—

If it could be shewn that we copied the title of our tale from an earlier work, we admit that we could not have any copyright in the title, but this is not shewn, and in the absence of any proof that we knew of *Surr's* novel, which is now obsolete, the title must be presumed to have been invented by *Hazlewood*. *Weldon* v. *Dicks* (3) went on the ground of there being copyright in a title, and is precisely in point; and *Mack* v. *Petter* (4) and *Bradbury* v. *Hotten* (5) support the view that there is copyright in a name.

[LUSH, L.J.:—The Defendant proves that a book with the same title was published in 1801, and that copies are still to be had. You do not rebut that by evidence that *Hazlewood* did not know of *Surr's* novel, and was an independent inventor. Moreover, the Defendant has not taken your title, but only a part of it.]

He has taken the material part, the part which would strike. The Plaintiff's author must be taken to have invented the title.

[JESSEL, M.R.:—What invention can there be in such a common-place title as "*Splendid Misery*"; and here there is a prior publication in *England* which would invalidate a patent.]

The analogy of patents hardly applies. Moreover, the Plaintiff

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(1) Law Rep. 2 Ch. 307.

(2) Page 1.

(3) 10 Ch. D. 247.

(4) Law Rep. 14 Eq. 431.

(5) Law Rep. 8 Ex. 1.

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is entitled to succeed on the ground of trade-mark; he is using a name associated with a particular publication. *Maxwell* v. *Hogg* (1) is distinguishable from this case; in that case there had been no publication.

JESSEL, M.R.:—

This is an appeal from a decision of Vice-Chancellor *Bacon*; and although the action, to my mind, is a most trumpery action, since I cannot imagine that the Plaintiff could seriously apprehend damage from what the Defendant has done, there are points of considerable importance as to the law of copyright which have been discussed and have to be decided.

As regards the nature of the action, it appears that the Plaintiff has a serial called "*Every Week*," and in this serial he publishes from time to time divers novels or novelettes with pictures. The Defendant is the proprietor of a weekly newspaper called "*The World*," a publication of a totally different description from the weekly serial of the Plaintiff, and in this newspaper he publishes from time to time, in addition to the ordinary contents of a newspaper, a novel, or a portion of a novel. The suggestion is, that because the Plaintiff had published a novel which was completed, called "*Splendid Misery; or, East End and West End, by C. H. Hazlewood*," in the serial called "*Every Week*," the Defendant, by publishing in "*The World*" what is called a *feuilleton*, that is, a chapter of a novel, under the title "*Splendid Misery*, by the author of *Lady Audley's Secret, Vixen, &c.*," was injuring the Plaintiff. I cannot imagine such a thing to be possible. The publications are of a totally distinct character and published at very different prices, the price of the Plaintiff's serial being a penny and that of the Defendant's being sixpence. They are totally different publications. The Plaintiff's serial is a collection of novels. The Defendant's is a newspaper with a *feuilleton*, or a chapter of a novel in it. Indeed, no two publications, each of which contained portions of a novel, could well be more different. That is the position of the parties as regards substance; and, in my opinion, there is really no substance in the action.

As regards the legal rights of the parties, there are, no doubt,

(1) Law Rep. 2 Ch. 307.

points to be considered. The Plaintiff claims copyright in the words "*Splendid Misery*" as a portion of the title of his novel. The Defendant objects, in the first instance, that the Plaintiff has not sufficiently registered his publication. There are two registrations. The first registration is a registration of "*Every Week.*" That appears to be a bad registration, because it was made before that periodical was published at all. But there is a second registration, and the second registration is of the first part of "*Splendid Misery,*" and is in every respect correct, unless we accede to the argument that the registration is invalid, because at the time when the first part was registered the second and subsequent parts had been published. I am quite unable to follow that argument. The registration informs the public of everything that the public could have any possible desire or right to know. It cannot be less a registration of the first part because the other parts had been then published. Each part may be registered separately, and each part was actually published separately, and each part is, according to the definition in the Act of Parliament, a book. It appears to me there is no tenable objection to the second registration.

The next point argued was, Can there be copyright at all in these words? I am of opinion that there cannot. The words "*Splendid Misery*" are common English words. I should say that the combination of them was a hackneyed and common combination, and it is proved that it was used as the actual title of a novel so far back as 1801. It does not appear to me that there was any invention in the combination of "*Splendid Misery,*" any more than there would be in the words "*Miserable Sinner,*" or anything of that kind. The adoption of the words as the title of a novel might make a trade-mark, and entitle the owner of the novel to say to any one else, "You cannot sell another novel under the same title so as to lead the public to believe that they are buying my novel when they are actually buying yours." That is intelligible, but it has no application to this case, because in the first place the titles of the publications are respectively "*Every Week*" and "*The World.*" No one would ask for "*Splendid Misery,*" but he would ask for "*The World*" or "*Every Week.*" But in addition to that, when you look at the titles of the novels, there is a marked difference between them. One is "*Splendid Misery; or, East End and West End, by C. H. Hazlewood*," and the other is "*Splendid Misery*, by the Author of '*Lady Audley's Secret*,' '*Vixen*,' &c." They are different titles. No doubt they have the words "*Splendid Misery*" in common, but there is such a difference between them, that the case was not seriously argued as regards trade-mark.

We come then to the question of copyright. Now I do not say that there could not be copyright in a title, as, for instance, in a whole page of title or something of that kind requiring invention. However, it is not necessary to decide that. But, assuming that there can be copyright in a title, what does copyright mean? It means the right to multiply copies of an original work. If you complain that a part of your work has been pirated, you must shew that that part is original, and if it is not original, you have no copyright. How can the title "*Splendid Misery*" be said to be original, when the very same words for the very same purpose were used nearly eighty years ago? The suggested answer is "People have forgotten that old novel." But that is not the point. Did the title become public property? If you go by the analogy of the patent law, it is very strong against the Plaintiff, because complete prior publication of an invention in *England* destroys the claim for novelty on the part of the patentee. I say complete publication, because there have been cases where it was held that a general description was not sufficiently complete and specific to prevent a title in the second inventor. But there is another circumstance. In the case of patentees, where there is a question of originality, you must prove that the alleged inventor was the inventor. In this case, Mr. *Hazlewood* being dead, and it having been shewn that the title was known many years ago, Mr. *Hazlewood* could not be called, and no one else has been called, to shew that Mr. *Hazlewood* invented the title, or that he did not copy it, as he might have done, from the old novel. Therefore in this case, even assuming you could establish a right to the title as original, if it was re-invented you have no evidence of the re-invention, but you have evidence of the prior publication. It seems to me, therefore, on that ground also that the action must be dismissed.

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It is unnecessary to go at length into the cases. I will only say this, that there seems to be a certain amount of confusion in the minds of some counsel, and perhaps of some Judges, between copyright and trade-mark. The things are totally distinct, and it appears to me that no authority binding on us has been produced to shew that there can be copyright in such a title as this. On that as well as on the grounds I have mentioned, I think the appeal must be allowed, and the action dismissed with costs both here and below.

JAMES, L.J. :—

Literary property can be invaded in three modes, and, as I believe, in three modes only. First, where a publisher in this country publishes an unauthorized edition of a work in which copyright exists, or where a man introduces and sells a foreign reprint of such a work, that is open piracy. The second mode is where a man pretending to be the author of a book illegitimately appropriates the fruit of a previous author's literary labour, and that is literary larceny. Those are the two modes of invasion against which the Copyright Acts have protected an author. There is another mode which to my mind is wholly irrespective of any copyright legislation, and that is where a man sells a work under the name or title of another man or another man's work, that is not an invasion of copyright, it is Common Law fraud, and can be redressed by ordinary Common Law remedies, wholly irrespective of any of the conditions or restrictions imposed by the Copyright Acts. Supposing a man were to publish a book calling it "*Soyer's Cookery Book,*" which it is not; or "*Colenso's Arithmetic,*" which it is not; or, as in a case we had here, *Metzler* v. *Wood* (1), represent it as being "*Hemy's Modern Tutor for the Pianoforte,*" which it is not, that is a Common Law fraud. That, as I said before, has nothing whatever to do with the Copyright Acts, and is not subject to any of the conditions of the Copyright Acts as to registration or otherwise. Before a man can establish any right of complaint he must bring the case under one of these three heads. In my opinion it is perfectly idle to suggest that the Defendant's publication of Miss *Braddon's* novel is an open piracy; it is equally idle to suggest that it is a literary larceny, and it is equally idle to suggest that it is a commercial fraud, and, as it is not one or the other of these, the Plaintiff never had, according to my view, the slightest ground or colour or pretence for the action he has brought, and it ought to be dismissed with costs both here and below.

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(1) 8 Ch. D. 606.

LUSH, L.J.:—

It is necessary to bear in mind what is the precise question which we have to decide in this case. This is not an action for pirating a trade-mark, nor is it an action for fraudulently using the title of a serial which the Plaintiff had published, in order that the Defendant may pass off his serial as the production of the Plaintiff, which would be a Common Law fraud. Nor is the question before us whether copyright can exist in the title of a work. The sole question before us is whether there can be copyright in the two words which the Defendant has taken, namely, the words "*Splendid Misery*," which have been used by the Plaintiff as the title of his tale, or, rather, as a part of its title, for the whole title is "*Splendid Misery; or East End and West End.*"

Before I consider this question I will notice the decision in *Weldon* v. *Dicks* (1), which was pressed upon us by the Plaintiff's counsel as being precisely in point. In that case a series of books had been published by the plaintiff. One work in that series was intituled "*Trial and Triumph.*" The Defendant subsequently published in two magazines, and afterwards in a separate volume, an entirely different book, but with the same title, "*Trial and Triumph.*" The plaintiff brought an action and claimed an injunction, alleging in his statement of claim that the defendant had published and continued to publish his work with the intention of inducing the public to believe, and he had in fact induced persons to believe, that the book so published by him was identical with that published and about to be republished by the plaintiff. That was an allegation of a Common Law fraud, and although the learned Vice-Chancellor did not explicitly put his judgment on that allegation, I cannot help thinking that it influenced his mind from beginning to end, and that he did not distinguish between a

(1) 10 Ch. D. 247.

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violation of a Common Law right and an infringement of copyright. But I observe that in the latter part of his judgment he says (1): "All the witnesses agree that the title of a book is a material part of the book, it is a valuable part of it, and the case is illustrated by a reference to Mr. *Thackeray's* work of *Vanity Fair*. Would any one be entitled to publish a book called *Vanity Fair*, leaving out the author's name? A person buying the cheap edition would expect to get *Thackeray's* work, and what a fraud it would be if he had got some spurious thing which was not worth reading." I cannot help thinking that this is the key to the whole judgment, and that what the learned Vice-Chancellor had in his mind was that the allegation was proved that the title was adopted for the very purpose of inducing persons to believe that the book was the same book as that which belonged to the plaintiff. If so, the case is no authority whatever on the present point, which, as I said before, turns on the simple question whether there can be copyright in the title "*Splendid Misery*," and I am clearly of opinion that there cannot. I take it to be established law that to be the subject of copyright the matter must be original, it must be a composition of the author, something which has grown up in his mind, the product of something which if it were applied to patent rights would be called invention. Nothing short of that would entitle a man to copyright. Now, can it be said there is anything original in these two words? I suppose there is hardly a person who has grown to maturity in this country who has not read them hundreds of times and heard them spoken hundreds of times. To my mind "*Splendid Misery*" is a hackneyed phrase. Moreover, it is in evidence that about eighty years ago a novel was published with that very title, and that, though it is out of print, second hand copies are still to be met with. If, therefore, we were to go no further back than that, the title has been known to the public for at least eighty years, and I cannot help thinking that the phrase originated many years before that. It was one likely to be coined in a very early age, and is one which, as I said before, most persons must have read and heard hundreds of times. That of itself is enough to determine the case. There is nothing original in the title. There is nothing in it that indicates

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(1) 10 Ch. D. 263.

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any intellectual effort. There is nothing more than the taking up a phrase which had long been in public use. It had become public property, and it is impossible that a person can appropriate it and claim copyright in it. That is the only question we have to decide, and on that ground I perfectly agree with the judgment of my learned colleagues that the appeal ought to be allowed with costs.

JAMES, L.J. :—

I desire to add that in my opinion, and I understand the Master of the Rolls to have expressed the same opinion, that there cannot in general be any copyright in the title or name of a book.

LUSH, L.J. :—

I desire to say that I do not dissent from that view, but I do not wish to decide the point, as in my opinion it does not call for decision in the present case.

Solicitors: *Montagu, Scott, & Baker; Lewis & Lewis.*

H. C. J.

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[1879 M. 283.]

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C. A.
May 25.

Executor—Pledging Testator's Assets—Carrying on Testator's Business—Testator's Goods seised under fi. fa. against Executor—Lapse of Time—Acquiescence—Renewal of Testator's Lease in Executor's own Name—Deposit to secure Executor's own Debt—Equities—Priority—Purchaser for Value without Notice—Possession of Title Deeds—Order to give up Deed to facilitate Sale.

If an executor, in pursuance of the directions contained in the testator's will, carries on the testator's business, and in so doing contracts debts, the fact that he has carried on the business in his own name and that the testator's assets employed in it are ostensibly the executor's own property, will not entitle a judgment creditor of the executor to take in execution the testator's assets.

Lapse of time and an enjoyment of the assets in a manner inconsistent

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with the trusts of the will, coupled with the consent of the beneficiaries, may, however, raise an inference of a gift of the assets by them to the executor, and entitle his judgment creditor to take them in execution. But, when the possession and the time which has elapsed are in accordance with the trusts of the will, no such inference can arise.

Ray v. *Ray* (1) distinguished.

An executor, six years after the death of the testator, surrendered a lease belonging to the testator, and took a renewed lease, including additional property and at an increased rent, in his own name. He afterwards deposited the lease as security for money advanced to him, which he applied to his own purposes. The renewed lease contained no mention of the surrender, and the mortgagee did not know that the borrower was an executor, or that he was not the beneficial owner of the lease. He did not, however, make any inquiry into the title. An action was afterwards brought to administer the testator's estate, and a consent order was made for the sale of the leasehold property, without prejudice to any right, the mortgagee giving up the lease to facilitate the sale. He claimed to be paid the amount due to him by the executor out of the proceeds of sale.

Held (affirming the decision of *Fry*, J.), that the lease was in equity part of the testator's estate, and that the equity of the estate being prior to the equity of the mortgagee, must prevail against it:

Held, also, that the equitable mortgagee was not injured by the order to give up the indenture of lease, and did not thereby acquire any claim upon the proceeds of the sale.

ADJOURNED SUMMONS.

John Morgan carried on the business of a dairyman at *Peckford Place, Brixton.* By his will, dated the 29th of January, 1870, he devised and bequeathed to his brother-in-law, *John Pillgrem*, his heirs, executors, and administrators, all his real and personal estate, upon trust so soon as conveniently might be after the testator's decease, to sell his business of a cowkeeper and dairyman, and all his livestock, carts, implements of trade, and leasehold houses at *Peckford Place*, and, after payment of his debts and funeral and testamentary expenses, to retain from the proceeds £200 for his (*John Pillgrem's*) own absolute use, and to invest the residue of such proceeds, together with any moneys that might be in his hands, upon the securities therein mentioned, and to pay the income to the testator's sister, *Margaret Pillgrem*, the wife of *John Pillgrem*, for her separate use during her life, without power of anticipation, and after her death to hold the invested premises in trust for such persons as she should by will or codicil appoint,

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(1) G. Coop. 264.

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and in default of appointment, in trust for the child or children, equally if more than one, of *John* and *Margaret Pillgrem.* And until a sale could be effected at a fair price of the testator's business and houses at *Peckford Place,* he desired *Pillgrem* to continue the business, and to hold any profits that might accrue, after maintaining himself and wife and son in the manner they then lived, upon the like trusts as those declared of the income of the invested proceeds of sale. And the testator appointed *Pillgrem* executor of his will. The testator died on the 3rd of June, 1870, and his will was proved by *Pillgrem* in September, 1870. The testator was at the time of his death possessed of two leasehold houses, Nos. 19 and 20, *Peckford Place,* where he carried on his business.

After the testator's death *Pillgrem* took possession of his property and carried on the business at the same place in his own name. He borrowed from one *William Hilliar* various sums of money, amounting to more than £300, of which £66 was, as the Chief Clerk's certificate found, employed for the purposes of the business, and the remainder was used for *Pillgrem's* own private purposes.

When *Hilliar* made the advances he did not know that *Pillgrem* was an executor, or that the business was not his own. On the 11th of September, 1879, *Hilliar* recovered judgment, in an action brought by him against *Pillgrem* in the Common Pleas Division, for £348 12*s.* 2*d.*, principal, interest, and costs, and on the same day he issued a writ of *fi. fa.* on the judgment, by which the sheriff was directed to levy on the goods and chattels of *Pillgrem* the amount recovered under the judgment. Under this writ, the sheriff, on the 12th of September, 1879, seized the furniture in the testator's house at *Peckford Place,* in which *Pillgrem* lived, and the stock-in-trade of the business, and also the leasehold interest in the house. In the year 1876, *Pillgrem* had surrendered the lease under which the testator held the houses 19 and 20 *Peckford Place,* and had obtained from the lessor a renewed lease in his own name. The renewed lease was at an increased rent, and it included two cottages, 17 and 18 *Peckford Place,* as well as Nos. 19 and 20. No mention was made in it of the surrender of the former lease. In November, 1877, *Pillgrem* deposited this renewed lease with *Hilliar* as security for an advance of £130 which *Hilliar* had made to him. When the advance was made *Hilliar* did not know that *Pillgrem* was an executor, or that the lease was not in equity his own property.

This action was brought by the only child (an infant by his next friend) of *Pillgrem*, against *Pillgrem* and his wife, for the administration of the estate of the testator. In answer to inquiries directed by the Court, the Chief Clerk certified on the 29th of January, 1881, that the whole of the property seized by the sheriff formed part of the estate of the testator, and that the same did not nor did any part thereof belong to *Pillgrem*, and that the same was not nor was any part thereof applicable to pay *Hilliar's* judgment debt. *Hilliar* took out a summons to vary this certificate by certifying that no part of the property seized by the sheriff formed part of the estate of the testator, but that the same belonged to *Pillgrem*, and was applicable to pay the judgment debt. This summons was, on the 31st of March, 1881, dismissed by Mr. Justice *Fry*. The Chief Clerk, by another certificate, dated the 28th of March, 1881, certified that *Hilliar* claimed to have a charge upon the stock, chattels, and effects seized by the sheriff by virtue of the writ, but that he had disallowed this claim. Also, that *Hilliar* claimed to have a charge upon the property comprised in the renewed lease by virtue of the deposit of the lease with him by *Pillgrem*, but that he had disallowed this claim also. *Hilliar* took out a summons to vary this certificate by certifying that he had a charge upon the stock, chattels, and effects seized by the sheriff by virtue of the writ to the extent of £326 18*s*. 2*d*. (the balance remaining due to him under his judgment, he having received payment of part of the amount from another source), and also that he had a charge for £130 and interest thereon upon the leasehold property in *Peckford Place* by virtue of the deposits of the lease.

The leasehold property had been sold under a consent order in the action, *Hilliar* giving up the lease to facilitate the sale, and the proceeds of sale had been paid into Court. The order was made expressly without prejudice to any rights.

The summons came on for hearing before Mr. Justice *Fry* on the 30th of April, 1881.

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Glasse, Q.C., and *Methold*, for the summons:—

The executor carried on the business in his own name, and his creditors were entitled to assume that the stock-in-trade and the house were his own. In such a case the Court will not interfere with the legal rights of the execution creditor: *Ray* v. *Ray* (1); *Fox* v. *Fisher* (2). The executor acted as absolute owner of the property, he took the renewed lease in his own name, there was nothing to shew any trust, and the persons beneficially entitled acquiesced: *Darbishire* v. *Home* (3). The provisions of the testator's will cannot affect a stranger.

J. Pearson, Q.C., and *Daniel Jones*, for the Plaintiff:—

In *Ray* v. *Ray*, the person really entitled had not made his claim for many years, and, moreover, the Court thought the claim was put forward merely to protect the executor, who was a relative. The present case is very different. *In re Johnson* (4) exactly applies; it shews that the creditors of an executor are entitled only to such right of indemnity out of the testator's estate as the executor himself has, and he can have no such right in respect of his own private debts.

As to the lease, if the executor dealt with it in that character, he could make a good title to a purchaser; but here it is admitted that *Hilliar* did not know he was dealing with an executor; he thought *Pillgrem* was the owner of the lease, and the money advanced not being applied to executorship purposes, the lender can get no better title than the executor himself had: *Farhall* v. *Farhall* (5).

[FRY, J., referred to *Berry* v. *Gibbons* (6).]

The applicant is entitled to be paid out of the estate the £66 which was employed in the business, but nothing more.

Glasse, in reply:—

An executor has power to mortgage the testator's leaseholds.

[FRY, J.:—For the purposes of the estate.]

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(1) G. Coop. 264.

(2) 3 B. & A. 135.

(3) 3 D. M. & G. 80.

(4) 15 Ch. D. 548.

(5) Law Rep. 7 Eq. 286; Ibid. 7 Ch. 123.

(6) Law Rep. 8 Ch. 747.

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A mortgagee is not bound to inquire into the application of the money which he advances: *Williams* on Executors (1).

[FRY, J.:—That is, if the executor borrows the money in that character.]

In *Farhall* v. *Farhall* (2), the money borrowed by the executor was misapplied.

[FRY, J.:—But it was borrowed as executor.]

Stroughill v. *Anstey* (3) is another illustration of the principle. The authority of *Scott* v. *Tyler* (4) has never been impeached, and there Lord *Thurlow*, speaking of a purchase from an executor, said "his title is complete by sale and delivery; what becomes of the price is no concern of the purchaser. This observation applies equally to mortgages and pledges." It was recognised by Lord *Hatherley* in *Earl Vane* v. *Rigden* (5).

[FRY, J., referred to *M'Leod* v. *Drummond* (6). There are three possible cases: 1. An executor as executor borrows money ostensibly for executorship purposes, on the security of the testator's assets. That is a valid transaction. 2. A man known to be an executor borrows on the security of the assets admittedly for his own private purposes. That is invalid. 3. An executor, not known to be such, borrows money for his own private purposes on the security of that which appears to be his own property, but is really the testator's property. Will that be supported? There seems to be no authority on the point.]

At any rate, the lease itself, the actual parchment, could not be taken away from a purchaser for value without notice: *Heath* v. *Crealock* (7). The deed was given up under a consent order to facilitate the sale, which could not have been effected without it, and therefore the applicant's right remains as against the purchase-money which is in Court, and he is entitled to be paid the £130 out of it.

It is admitted that he must be paid the £66 out of the assets, and as to the rest of the claim, there is no equity to set aside the legal right required by the execution: *Tugman* v. *Hopkins* (1); *Carne* v. *Brice* (2).

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(1) 8th Ed. vol. ii. pp. 938, 939.

(2) Law Rep. 7 Eq. 286; Ibid. 7 Ch. 123.

(3) 1 D. M. & G. 635.

(4) 2 Dick. 724.

(5) Law Rep. 5 Ch. 663, 668.

(6) 17 Ves. 152.

(7) Law Rep. 10 Ch. 22.

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J. Pearson, in reply, as to *Heath* v. *Crealock* (3):—

Pillgrem was a trustee of the old lease, and the new lease, as soon as it was granted to him, became in equity trust property. The deposit of the lease conferred only an equitable title of the same kind, and it was posterior in date and must be postponed to the equity of the *cestui que trust*.

FRY, J., after stating the facts, continued:—

It appears to me that the principles which regulate questions of this sort are very clear. As I understand them, where a trustee or executor carries on a business under the directions contained in the will of the testator, and in that character contracts a debt, the debt is one for which an action must be brought against the executor personally, and for which judgment must be obtained *de bonis propriis* of the executor, and no action can be successfully brought against the executor as executor, and no execution can be had *de bonis testatoris*, for this very simple reason, that the debt was not the debt of the testator. In making these observations I say nothing about the right which the executor undoubtedly has to come against the assets of the testator.

Now, is the present case in any way altered by the fact that the things seized by the sheriff were in the ostensible possession of *Pillgrem*, and that no person looking at the place of business would know they were the property of the testator? It was long ago decided that this can make no difference. In *Dawson* v. *Wood* (4), a case which has not been referred to, an action of trespass was brought against the sheriff for seizing certain property of which the Defendant was in the apparent possession; it was not his property, and it was held that trespass could be maintained. The marginal note is this: "The Plaintiff having purchased a public-house, for which he could not himself obtain a license, because he resided in another tavern, put *B.*, an insolvent person, into the house as his servant, to keep it for him, and supplied him with money to pay for the license, which was granted to *B.*: Held, that the sheriff was not entitled to take, under an execution against *B.*, the Plaintiff's liquors and chattels in the house, committed to *B.'s* custody." It is true that Lord Chief Justice *Mansfield* took a different view, but the majority of the Court decided the case in that way. Mr. Justice *Heath* said: "I cannot agree with my Lord. It is not sufficient that *Pyke* is the ostensible owner of the goods; if so, there would have been no need of the statute 21 Jac. 1, and so to hold would be extending that statute to all other cases as well as bankruptcy." But it is said that, although that may be the rule in a case which happens shortly after the death of the testator, it does not apply to a case which arises many years after his death. In other words, it is said, I suppose, that an inference then arises that the goods have become the property of the person in whose ostensible possession they are. In some cases, undoubtedly, lapse of time, coupled with the consent of the beneficiaries, and an enjoyment of the goods in a manner inconsistent with the trusts, may raise an inference of gift or alienation by the persons beneficially entitled to the person ostensibly in possession. But when the possession is in accordance with the trusts, and the time is also, if I may use such an expression, in accordance with the trusts, then neither lapse of time nor ostensible possession will raise any inference of gift by the beneficiaries. That point, again, is not a new one, for it came before the Court of Queen's Bench in *Fenwick* v. *Laycock* (1), and was determined accordingly. The marginal note is this: "When the goods of a defendant, who alleges that he holds them solely as trustee, are taken in execution, the defendant, in his character of trustee, may in general dispute the seizure; and the sheriff, in such case, is entitled to the benefit of an interpleader rule under sect. 6 of statute 1 & 2 Will. 4, c. 58." There it was shewn that the trustee had been in possession for a long time, and Lord *Denman*, in delivering the judgment of the Court, after referring to an earlier case of *Gaskell* v. *Marshall* (2), in which Lord *Tenterden* said, "If the plaintiff had been in possession of the goods for a very long time, it might have been otherwise," added, "and here the possession has been

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(1) 5 Scott, N. R. 464.
(2) 7 M. & W. 183.
(3) Law Rep. 10 Ch. 22.
(4) 3 Taunt. 256.

(1) 2 Q. B. 108.

(2) 5 Car. & P. 31.

long; but then it is a possession consistent with the will and necessary to the execution of the trust reposed." It follows, therefore, in my judgment, that neither the ostensible possession of *Pillgrem,* nor the lapse of time, can make any difference. The moment it is found that this property was really trust property in his hands, execution on a judgment against him could not be levied upon it. The argument in support of the summons has almost gone the length of suggesting that trust property in the hands of a trustee may be seized by his execution creditor. In my judgment nothing is plainer than this, that the property which can be taken under an execution is only that property to which the execution debtor is beneficially entitled, and that no property of which he is only a trustee can be taken. The case of *Ray* v. *Ray* (1) has been very properly relied upon. In that case the Court dissolved an interlocutory injunction which had been granted on the application of a creditor of a testator to restrain a creditor of the executor from selling the testator's leaseholds under an execution for his own debt. The point was not finally determined, but the Court thought the circumstances were such as to raise an inference of a gift by the testator's creditor to the executor. When another case arises in that form I shall follow *Ray* v. *Ray*, but the present case is very different.

The next point for determination relates to the leasehold property. That has been put upon two grounds. First, there is the execution itself, pure and simple; but that, of course, is the same question as I have already disposed of with regard to the chattels. The next point is this. It is said that by virtue of the deposit of the lease the creditor is entitled to a charge upon the property. Now that appears to me to stand simply in this way. The applicant, Mr. *Hilliar,* claims an equity against the property by virtue of the deposit of the lease. The testator's estate claims an equity by virtue of the renewal. Neither equity is denied by the claimant of the other. But the equity of the estate attached the moment the renewed lease was granted; the equity of the depositee attached only when the deposit was made; the equity of the estate, therefore, is prior in time to that of the depositee. And it appears to me that the rule applies, *Qui prior est tempore*

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(1) G. Coop. 264.

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potior est jure, for there is no superiority in the one equity over the other which would make me displace the preceding right. Then it is said that the sale of the leasehold property took place under a consent order, and that therefore I am bound to look to the rights of the parties as they stood when that order was made. Now, according to *Heath* v. *Crealock* (1), it would be impossible for the persons interested in the testator's estate to take the lease itself, the parchment, away from the depositee if he is a purchaser of it for value without notice; and if that is made out, it appears to me to justify the argument that the money realized from the sale of the leasehold property must go to satisfy the applicant's charge in the first instance, because the sale could not have been made without the lease being given up. But is Mr. *Hilliar* a purchaser for value without notice? In order to shew that, it must be shewn that he took all reasonable care and made inquiry, and that, having taken that care and made that inquiry, he received no notice of the trust which affected the property. It is not in evidence that he made any inquiry at all. I am bound to assume that, if he had called for an abstract of title, an honest abstract would have been furnished to him, and he would then have seen that the property was affected by a prior trust. In my judgment, a person who shuts his eyes, and takes without inquiry, cannot say he is a purchaser without notice, when, if he had made inquiry and an honest answer had been given, he would have had notice. I hold, therefore, that this contention also fails. It follows that I refuse the summons with costs.

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From this decision, so far as it related to the lease, *Hilliar* appealed. The appeal was heard on the 25th of May, 1881.

Glasse, Q.C., and *Methold*, for the Appellant:—

The Appellant had no notice of the trusts. He was a purchaser for value without notice. There was no indication in the way in which the business was carried on by *Pillgrem* that it was not his own business; and there was nothing in the lease to shew that it was affected by any trust. The Appellant has been deprived of the advantage which he possessed, by giving up his lease, which was done under the order of the Court in order to carry out the sale. He ought not to be prejudiced by this. If he had kept the lease, as he had a right to do, he might have stopped the sale till his claim was admitted: *Heath* v. *Crealock* (1); *Ray* v. *Ray* (2).

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(1) Law Rep. 10 Ch. 22.

J. Pearson, Q.C., and *D. Jones*, for the Plaintiff; and

Stirling, for the Defendants, were not called on.

JESSEL, M.R.:—

I am of opinion that this appeal from the decision of Mr. Justice *Fry* cannot succeed. The executor was appointed by the will of the testator with directions which, in effect, made him a trustee of the business, and he was to carry it on and account for the profits to the *cestuis que trust*. The will was proved in September, 1870, and the trustee did not sell the property, but continued to carry on the business under the will. He did not act otherwise than as a trustee; he did everything rightly until he came to this: The lease of the premises in which the business was carried on was surrendered by him, and he took a new lease for a longer period of those premises, and also of two adjoining cottages, and continued to carry on the business in them.

The first question then is, what is the effect of his having taken this lease? The renewed lease would not have been granted but for the surrender of the old one. It is well settled that a trustee cannot get a benefit to himself by dealing with the trust property. How, then, could this trustee get any benefit from the new lease? This being the position of the matter, he was a trustee of the new lease. In 1879 he borrowed in his own name, for his own use in carrying on the business, a sum of money from the Appellant, and he deposited the lease with him. It is true that the Appellant had no notice that *Pillgrem* was not the lawful owner of the property comprised in the lease. If he had inquired into the landlord's title he would have got no notice. He was therefore a purchaser without notice, who did not get the legal title, therefore he must take the lease subject to prior equities, that is, to the trust on which it was held. He acquired nothing beyond that, except the right to the parchment. At a subsequent period he issued execution against the chattels of his debtor, and among other chattels were the leasehold premises, and in order to enable the sheriff to seize, the lease was handed to him. I asked the counsel if the sheriff could seize trust property for the debt of the trustee, and it was admitted that he could not. The result was that the execution gave the creditor no better title than he had before; therefore he got no title to the lease under the execution, and therefore he has no legal title to the property, and as to his equitable interest he must be postponed to the *cestuis que trust.*

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(1) Law Rep. 10 Ch. 22, 33.

(2) G. Coop. 264.

Then it is said that the trustee was prejudiced by the order for him to give up the parchment. Was it intended by that order to secure to the creditor any right to the parchment? No; because the property was to be sold, and the parchment was to go to the purchaser. But it was suggested that he acquired thereby a new title which he had not before—a right to the proceeds of the sale. He acquired no such right. It is suggested that if he had known his own right he would have stipulated for a share of the proceeds before giving up the deed. The answer is that if he had refused there would have been a condition stating that the vendor had only a copy of the lease, but that the holder of the lease was bound by the order for sale. I have known very many special conditions like that, and I believe it would have made no difference to the sale. The order did no injury to him; he could have got no benefit from the parchment if he had kept it. The truth is, he thought he was entitled to the proceeds of sale, and therefore he wished it to be a good sale and did not wish to prejudice it. He did not intend to get a new right. The decision of the Judge is, in my opinion, correct.

JAMES, L.J.:—

I am of the same opinion. I should not add anything except for the argument that the Appellant had been entrapped by the order of the Court. I believe that what the parties meant and agreed to do was this: The equitable depositee thought he had a good equitable mortgage and a prior right, and the other parties thought the same, and they all thought it better that there should

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be no dispute before the sale, and that if they could concur in making a marketable title, that could be done without prejudice to the rights of the parties. No one thought any benefit arose from the mere possession of the parchment. That sort of right was never suggested. Both parties probably thought that they had the prior title and the best right to the proceeds of the sale, and were willing not to throw any obstacle in the way of realizing them: and there was no intention to put any price on giving up the deed. Therefore the Appellant has no right to say that his consent was obtained from him by the Court under a misapprehension.

LUSH, L.J.:—

I entirely agree as to the effect of the order of the Court. The Appellant says he is in a different position from that which he would have been in if he had kept the lease. I think he has sustained no detriment, and on that question therefore I acquiesce in what has been said by my Brethren. The matter that presses on my mind is whether the surrender was the sole consideration for getting a lease of the new property. The trustee did not pay any money for it, but his personal character might be a consideration. Therefore I stagger at the *dictum* that the trust affects the whole of the property included in the new lease. I do not dispute it in this case, but I cannot accede to the general proposition.

Solicitors: *J. P. Murrough; Allen & Edwards.*

W. L. C.
M. W.

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June 20.

In re DURRANT AND STONER.

Married Woman—Interest in Land—Fines and Recoveries Act (3 & 4 Will. 4, c. 74), s. 77.

23 ChD/185

MC(3)/111.

A fund of personalty was settled in 1842 upon trust during the joint lives of a husband and wife for the wife for her separate use without power of anticipation, then for the survivor during his or her life, and after the death of the survivor for such of their children as being sons should attain twenty-one, or being daughters attain that age or marry, in equal shares. There was no power to invest in purchase of land. The trustees bought a freehold house with part of the fund. The only children were two daughters, who attained twenty-one and married. After this the trustee, the husband and wife, and the daughters and their husbands, by deed duly acknowledged by the daughters, conveyed the estate to such uses as the father and mother should jointly appoint, and in default as the survivor should by deed or will appoint. After the death of the mother the father contracted to sell the estate. The purchaser objected to the title on the ground that, as the purchase of real estate was unauthorized, the interest of the daughters was still to be treated as a reversionary interest in personalty of which they could not dispose:—

Held (reversing the decision of *Hall*, V.C.), that the father could make a good title.

BY a settlement dated the 4th of January, 1842, made on the marriage of Mr. and Mrs. *Durrant*, a sum of stock was settled upon trust during the joint lives of the husband and wife for the wife for her separate use without power of anticipation, and after the decease of such one of the husband and wife as should first die, for the survivor for life, and after the decease of the survivor, in trust for all the children and child of the marriage who being sons or a son should attain twenty-one, or being daughters or a daughter should attain that age or marry, and if more than one, in equal shares. The settlement contained no power to invest in the purchase of real estate.

In 1853 the trustees of the settlement invested £550, part of the trust funds, in the purchase of a freehold messuage, which on the 7th of May, 1853, was conveyed to them in fee.

There were two children only of the marriage, both daughters, who attained the age of twenty-one years and married before 1875.

By a deed dated the 8th of October, 1875, made between the surviving trustee of the first part, the husband and wife of the second part, the two daughters and their husbands of the third and fourth parts, and *W. C. Cripps* of the fifth part, and duly acknowledged by Mrs. *Durrant* and the two daughters, the parties of the first four parts conveyed the property to such uses as *Durrant* and wife should jointly appoint, and in default of such appointment, then from and after the decease of such one of *Durrant* and wife as should first die, to such uses as the survivor of them should by deed or will appoint, and in default of such appointment, then, after the decease of such survivor, to the use of the daughters, their respective heirs and assigns, as tenants in common in fee.

Mrs. *Durrant* having died, *Durrant* contracted with *Stoner* to sell the property to him for £1060.

The purchaser took out a summons under the *Vendor and Purchaser Act*, 1874, for a declaration that a good title had not been shewn.

The summons was heard before Vice-Chancellor *Hall* in Chambers, and his Lordship decided that a good title had not been shewn. *Durrant* appealed.

W. Pearson, Q.C., and *Holt*, for the Appellant:—

We say that the title as it stands is good, but if any objection should be considered to arise to the deed of 1875, on the ground of the relation of parent and child, the daughters and their husbands are ready and offer to concur in the conveyance to the purchaser. Whatever interest the married women have in the land they can convey by acknowledged deed; and even if the property had been sold for less than the trustees gave for it, the purchaser would be safe, though the trustees could not be released by the married women from the loss occasioned by the breach of trust.

B. B. Rogers, for the purchaser:—

If this land had not been purchased by a breach of trust a good title to it could no doubt have been made. The purchase, however, was unauthorized, and this being so, the interests of the

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daughters must be looked upon as being simply interests in a reversionary fund of personalty under a settlement prior to *Sir R. Malins's Act*: and with such interests married women have no power to deal.

JESSEL, M.R.:—

In my opinion there must have been some mistake in this case. The Vice-Chancellor before whom it was argued in Chambers is a great real property lawyer, and no doubt was under a misapprehension as to the facts, which are shortly these: A fund of personal estate was settled upon trust during the joint lives of a husband and wife for the separate use of the wife without power of anticipation, then for the survivor of them for life, and after the death of the survivor for such of their children as being sons should attain twenty-one, or being daughters attain that age or marry. The trustees in breach of trust invested part of the fund in the purchase of a house. The only children were two daughters, and after they had attained the age of twenty-one and married, they, by duly acknowledged deed in which their husbands joined, concurred with their parents and the trustee in conveying the house to such uses as the parents should jointly appoint, and in default of such appointment to such uses as the survivor of the parents should by deed or will appoint, and in default of appointment under either of the powers to the use of the daughters as tenants in common in fee. The mother has died, and the father is selling under the power in that deed. He clearly can vest the legal estate in the purchaser, and I am of opinion that he can give him a good title. The daughters could, by acknowledged deed, dispose of whatever interest they had in the house; the terms of the *Fines and Recoveries Act*, 3 & 4 Will. 4, c. 74, s. 77, having regard to the definition of "estate" in the interpretation clause, being of the widest possible description. What is there to prevent the daughters from so disposing of their interests? There is no stipulation in the settlement disabling them from disposing of their reversionary interests in the settled fund; their inability to do so arose only from the rules of law, not from contract; and this legal disability did not exist as to their interest in the land purchased. Some over-

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refined notion has been suggested that because the purchase of land was unauthorized the daughters cannot deal with their interest in that land; but that contention appears to me quite unfounded. In order to get rid of any possible objection as to dealings between parent and child, the daughters and their husbands are willing to concur in the conveyance to the purchaser; but no objection of that kind was taken by the purchaser, and I am of opinion that the father was able to make a good title.

BAGGALLAY, L.J.:—

I am of the same opinion. We have unfortunately no information as to the grounds of the decision of the Vice-Chancellor, and I think that he must have been under some misapprehension as to the facts.

LUSH, L.J.:—

I am of the same opinion.

Solicitors for Vendor: *Sole, Turner, & Knight.*
Solicitor for Purchaser: *Scarlett.*

H. C. J.

Explained. *Re* a DEBTOR (No. 564 of 1949) [1950] 1 Ch. 282

Ex parte JONES. *In re* JONES.

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19 Ch D. 6

Adjudication of Bankruptcy—Infant—Trading Contract—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 125, *sub-s.* 12—*Infants' Relief Act*, 1874 (37 & 38 *Vict. c.* 62), *s.* 1.

An infant who has traded cannot be adjudicated a bankrupt on the petition of a person who has supplied him with goods on credit for trade purposes, but to whom he has made no express representation that he is of full age, even though he has previously filed a liquidation petition the proceedings under which have become abortive.

Nor could the Court under such circumstances make an adjudication against the infant under sub-sect. 12 of sect. 125 of the *Bankruptcy Act*, 1869.

Whether, if the infant had expressly represented to the petitioning creditor that he was of full age, an adjudication could be made, *quære.*

The *Infants' Relief Act*, 1874, applies to the trading contracts of an infant.

Decision of *Bacon*, C.J., reversed.

Ex parte Lynch (1) overruled.

WILLIAM JONES, who was born on the 27th of July, 1861, carried on the business of a dealer in coal, coke, and breeze, at

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(1) 2 Ch. D. 227.

West Bromwich. He had married a widow, who had prior to the marriage carried on the business, and after the marriage *Jones* continued it. Before the marriage he made a declaration that he was of full age. On the 21st of February, 1881, he filed a liquidation petition in the *Oldbury* County Court. After the filing of the petition he applied for and obtained an injunction restraining the proceedings in an action which had been brought against him for an alleged debt. The first meeting of the creditors was held on the 10th of March, 1881. Resolutions were passed in favour of a composition, but were not supported by a sufficient majority of the creditors, and the meeting separated without passing any resolutions. On the 22nd of March, 1881, the Corporation of *Birmingham,* who had supplied *Jones* with coke and breeze for the purposes of his business to the amount of £180 13*s*., for which he had not paid, presented a bankruptcy petition against him in the County Court, alleging that he was indebted to them in the sum of £180 13*s*., and that he had committed an act of bankruptcy by filing the liquidation petition. An affidavit in support of the petition was made by an officer of the corporation, in which he stated that *Jones* had not at any time during the delivery of the coke and breeze with which the corporation had supplied him informed them that he was an infant, and that until the meeting of the creditors under the petition the corporation had no knowledge that he was an infant. It was not, however, alleged that he had ever in fact represented to the corporation that he was of full age. There was no evidence that he owed any debt for necessaries. *Jones* gave notice that he intended to oppose the making of an adjudication on the hearing of the petition, when he should dispute the petitioning creditors' debt on the ground that it was not a debt provable in bankruptcy, and that he was an infant under the age of twenty-one years, and that the petitioning creditors' debt was not for necessaries. And he further gave notice that he intended to rely on the provisions of the *Infants' Relief Act,* 1874.

On the 8th of April, 1881, the County Court Judge, considering that he was bound by the decision of the Chief Judge in *Ex parte Lynch* (1), made an adjudication of bankruptcy. *Jones* appealed to the Chief Judge. The appeal was heard on the 9th of May, 1881.

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(1) 2 Ch. D. 227.

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E. Cooper Willis, for the Appellant:—

The debtor being an infant, there is no liquidated debt due from him, either at law or in equity, in respect of which he can be made a bankrupt: *Bartlett* v. *Wells* (1); *De Roo* v. *Foster* (2). The *Infants' Relief Act*, 1874 (37 & 38 Vict. c. 62), is absolute in its terms, and enacts that a debt contracted during infancy cannot form the ground for an action, and cannot be ratified after full age is attained: *Ex parte Kibble* (3). *Ex parte Lynch* (4) will be relied on, but may be distinguished, as in that case the debtor had ceased to be an infant when the petition on which he was adjudicated bankrupt was presented. Moreover, that decision has been disapproved of in later cases: *Miller* v. *Blankley* (5); *Reg.* v. *Wilson* (6).

De Gex, Q.C., and *Finlay Knight*, for the petitioning creditors, the Respondents:—

The case is governed by *Ex parte Lynch*, which has never been questioned, and seems to have been distinctly recognised in *Ex parte Pearce* (7). So long as the infant by his acts—*e.g.*, by carrying on trade—holds out to the world that he is of full age and capable of contracting debts, he is liable in equity, as the consequence of his representations, to pay, and to be made bankrupt in respect of, debts contracted on the faith of such representations: *Ex parte Unity Joint Stock Mutual Banking Association* (8). All that the common law cases decided was, that there was no legal answer to the plea of infancy. In *Miller* v. *Blankley* there was no evidence to shew that the creditors were not aware of the debtor's infancy, but here it is distinctly sworn that they did not know of it. Then in this case there is this additional circumstance, that the infant has himself filed a petition for liquidation, and thus submitted himself to the jurisdiction of bankruptcy. Assuming that under the old law an infant might have been adjudicated bankrupt on his own petition, *Re Smedley* (9), it seems

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(1) 1 B. & S. 836; 31 L. J. (Q.B.) 57.
(2) 12 C. B. (N.S.) 272.
(3) Law Rep. 10 Ch. 373.
(4) 2 Ch. D. 227.
(5) 38 L. T. (N.S.) 527.
(6) 5 Q. B. D. 28.
(7) 2 Ch. D. 320.
(8) 3 De G. & J. 63. 4 Jur NS. 1257
(9) 10 L. T. (N.S.) 432.

(2) Sc 8 Jur NS. 762

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that under the existing law (*Bankruptcy Act*, 1869) he may present a petition for liquidation by arrangement or composition: *Robson* on Bankruptcy (1). And where, as here, the liquidation by arrangement cannot proceed, the Court has power by the *Bankruptcy Act*, 1869, s. 125, sub-s. 12, to adjudge the debtor a bankrupt, and proceedings may be had accordingly.

E. Cooper Willis, in reply:—

Bartlett v. *Wells* (2) was not decided on the mere question whether the plea of infancy was a sufficient answer at law to a declaration for goods bargained, sold, and delivered. Chief Justice *Cockburn* there says: "The replication affords no answer to the plea, either at law or in equity—taking the whole (declaration, plea and replication) together, it appears that the defendant being a minor represented himself to be of full age, and by that representation induced the plaintiff to enter into a contract which defendant has failed to perform. Now, if that had been stated in a declaration, would it have been maintainable in an action at law? Clearly not on the authorities; and even in equity this replication would not have been an answer to a defence of infancy set up in answer to a bill founded on the contract, say, for specific performance." Here, except by inference, there had been no misrepresentation, no misleading, as in *Ex parte Unity Joint Stock Mutual Banking Association* (3), by express and distinct statement by the minor that he was of full age.

[BACON, C.J.:—That case was, I think, decided on view.]

To deprive the infant in equity of his legal privilege there must have been false assertion or actual misrepresentation: *Stikeman* v. *Dawson* (4). *Ex parte Lynch* (5) is distinguished, as the adjudication was not made until after the infant had become of full age. In filing a liquidation petition the debtor took a proceeding which as an infant he could not lawfully take: *Ex parte Lynch* (6); and therefore there has been no adoption of the

(1) 3rd Ed. p. 96.

(2) 1 B. & S. 836; 31 L. J. (Q.B.) 57. 8 Jur NS 762

(3) 3 De G. & J. 63. 4 Jur NS 1157

(4) 1 De G. & Sm. 90.

(5) 2 Ch. D. 227.

(6) 2 Ch. D. 227, 229.

bankruptcy proceedings. Being a person incapable of contracting debts, he could not submit himself to the jurisdiction of bankruptcy.

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BACON, C.J. :—

This is a point of very great nicety. The cases referred to at common law do not, in my opinion, touch the point which is relied upon, the first case mentioned being purely a case of special pleading, though it is true that the Judges go out of their way to consider what might be done in equity. But then they do that only for the purpose of illustrating the proposition upon which they rely, that, as a matter of special pleading, the demurrer to the replication was to prevail. I do not think that any of the observations carry that case as an authoritative decision any further.

The *Infants' Relief Act*, which has been referred to, declares in very express terms that contracts made with infants shall be void, but it contains that proviso, the strict meaning of which it is difficult to follow—that "this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable;" so that there is some exception to the strictness of the enactment that all contracts are to be void. If this had been merely an action brought by a creditor against an infant debtor, no doubt the statute would be a complete answer to it. So it would have been before the Act was passed; so it would have been under any circumstances if it was a mere action. But what I have to deal with is not an action, but the act of this infant who owing debts (whether recoverable or not does not signify) presents a petition under the *Bankruptcy Act*, 1869, s. 125, in which he says, I am unable to pay my debts, and I desire to surrender all that I have in the world to satisfy my creditors, and to get the Court to approve of an arrangement. By doing that he unquestionably committed an act of bankruptcy, not an act of bankruptcy like that in *Reg.* v. *Wilson* (1), where creditors had proceeded penally against him for his misconduct,

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(1) 5 Q. B. D. 28.

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but by his own act he invokes the authority in bankruptcy and seeks the protection of the Court. He files his petition, and that falling through, the creditors, who were creditors for goods sold and delivered, applied for an adjudication against him, and it is said that because he was protected against an action for debt he is therefore clothed with the protection which bankruptcy affords to him upon his own petition, and the creditors are to be without any remedy while he is effectually protected. There is nothing in the statute or in any other law that prevents an infant from presenting a petition in bankruptcy. There are the words, no doubt, which were quoted to me from *Ex parte Lynch* (1), in which I said he had no right to do it. That must be taken with the consideration of the whole subject which was under discussion, and must not be read as if it were a decision that an infant could not present a petition in bankruptcy. He has presented a petition and derived all the benefit which the Legislature intended to confer on insolvent debtors, if they submitted themselves to the law. Now that is the case I have to consider, and putting the cases at common law aside, as having nothing whatever to do with the question submitted to me, and putting aside also, as wholly distinguishable, that criminal case which has been referred to, where it was sought to punish the debtor for not conforming to the law in bankruptcy which his creditors had set in motion against him, I have to consider what is the law. Now in *Ex parte Lynch* I considered it to be well settled law that the jurisdiction in bankruptcy was at all times an equitable jurisdiction. Whether it is as much so now as it was it is not necessary for me to inquire, but that it is an equitable jurisdiction now I am entirely persuaded. The cases which were referred to in *In re Unity Joint Stock Mutual Banking Association* (2) are very numerous. They were treated there as being conclusive upon the subject, that an infant might be a bankrupt. What is it that the petitioning creditor seeks to do? Not to sue for his liquidated debt, but he says, Inasmuch as this debtor has by his own act surrendered the whole of his property for division amongst his creditors, I desire to make him a bankrupt. That is the case, that and nothing else. There is no question about representation,

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(1) 2 Ch. D. 229.

(2) 3 De G. & J. 63. 4 Jur. N.S. 12

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no question of fraud. The case of the *Unity Bank* (1) was discussed at very great length, argued with the greatest possible ability, but the authorities, as the Lord Justice *Knight Bruce* said, were (and they are the same now as they were then) conclusive upon the subject, that, if an infant is lawfully made a bankrupt, then all the necessary consequences of bankruptcy follow. Having made himself a bankrupt, how can I hear him say that he is not lawfully made a bankrupt? He has committed an act of bankruptcy, and asked for the protection of the Court and has obtained it. That is not an action which the *Infants' Relief Act* contemplates in the slightest degree. It is to protect an infant against any assault by his creditors, against any action brought by his creditors. The creditors have brought no action, they have asked the Court to give full effect to that proceeding which the debtor has himself begun, of which he desires to have the benefit under the law. The distinction is to my mind perfectly clear and distinct. The law that an infant cannot be sued does not depend only on the statute, it is the law which has prevailed for centuries. No creditor is here suing him. On the contrary, the creditor who asks to have him adjudicated bankrupt takes up the proceedings where the debtor has left them, and says, "Since you come to the Court and say you are unable to pay your debts, and you are willing to surrender the whole of your estate, let an adjudication in bankruptcy be directed," and that is the order which is now appealed from.

The question is one of great nicety, but in my opinion the adjudication is properly made, because it was made at the instance, as it may be truly said, of the debtor himself. I think I must follow the case of the *Unity Bank*, in which the matter was carefully and fully considered. The principle is perfectly plain and intelligible, and not affected, in my judgment, either by the common law cases which have been referred to, or by that criminal case which was of a totally different kind. I think this appeal fails, although, as I say, the point is an extremely nice one, and there are a variety of decisions, all of which it is not easy to reconcile.

I may add that in cases where the doctrines of law are opposed

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(1) 3 De G. & J. 62. 4 Jur NS 1257/

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to the doctrines of equity, which seem to be various, the equitable doctrine is now to prevail.

From this decision *Jones* appealed. The appeal was heard on the 23rd of June, 1881.

E. Cooper Willis, for the Appellant:—

It is not suggested that the Appellant ever made any express representation to the Respondents that he was of full age.

[JESSEL, M.R.:—How can a man be made a bankrupt who does not owe a debt?]

The Judge of the County Court felt himself bound by the decision of the Chief Judge in *Ex parte Lynch* (1), and the Chief Judge has taken the same view as he did in *Ex parte Lynch*. That decision, however, was disapproved by the Common Pleas Division in *Miller* v. *Blankley* (2).

[JESSEL, M.R.:—*Ex parte Lynch* appears to be directly contrary to the decision of the Court of Appeal in *Ex parte Kibble* (3).]

[He was stopped by the Court.]

De Gex, Q.C., and *Finlay Knight*, for the corporation:—

In equity an infant is liable for holding himself out to be of full age, and such a liability is provable in bankruptcy: *Ex parte Unity, &c., Banking Association* (4).

[JESSEL, M.R.:—When that was first decided bankruptcy was not final; it could be disputed in an action at law: *Ex parte Watson* (5).]

If the liability is provable it must also be a good petitioning creditor's debt.

[JESSEL, M.R.:—All liabilities are now provable in bankruptcy; would any possible contingent liability support a bankruptcy petition?]

It is sufficient under sect. 6 of the present *Bankruptcy Act* that the petitioning creditor's debt should be due in equity. Trading by an infant is a representation that he is of full age: *Ex parte Lynch* (1).

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(1) 2 Ch. D. 227.

(2) 38 L. T. (N.S.) 527.

(3) Law Rep. 10 Ch. 373.

(4) 3 De G. & J. 63. 4 Jur NS 1157

(5) 16 Ves. 265.

[JESSEL, M.R:—Trading by an infant is not illegal. Does a boy who sells oranges in the streets hold himself out to be of full age?]

The Appellant represented himself to be twenty-one when he married; that estops him from denying that he was then twenty-one: *Ex parte Bates* (2).

[JESSEL, M.R.:—That representation was made for another purpose.]

In *Kirton* v. *Eliott* (3) there was an action of debt for rent behind. The plaintiff declared upon a lease made by him to the defendant, being an infant, rendering a certain yearly rent and for rent behind, and the Court held that the infant lessee was liable to pay the rent.

[JESSEL, M.R.:—I had to consider that case in *Lemprière* v. *Lange* (4). It appears from *Rolle's* Abridgment (5), and from the report of the case under the name of *Ketsey's Case* (6), that the defendant was of full age before the rent day came. And the Court held that the lease was voidable only at the election of the infant, "for if it were for his benefit, it shall be noways void; but the infant, at his election, may make it void, by refusing and waiving the land before the rent day comes; for then no action of debt will lie against him. But in the principal case it was not shewn that the rent was of greater value, and the defendant was of full age before the rent day came; therefore it was adjudicated for the plaintiff."]

It would be consistent with common sense that an infant should not be able to obtain the goods of other people on credit and then avoid paying for them.

[LUSH, L.J., referred to *Reg.* v. *Wilson* (7).]

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(1) 2 Ch. D. 227.

(2) 2 M. D. & D. 337.

(3) 2 Buls. 69; S.C. *sub nom. Ketley's Case*, 1 Brownl. 120.

(4) 12 Ch. D. 675.

(5) Vol. i. p. 731.

(6) Cro. Jac. 320.

(7) 5 Q. B. D. 28.

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That was a criminal prosecution under the *Debtors Act*, 1869, for quitting *England* with property which ought to have been divided amongst creditors, and it was necessary to shew that there were creditors. In *Nelson* v. *Stocker* (1) it was held that an infant who before his marriage had executed a marriage settlement, by which he covenanted to pay £1000 to the trustee, was not bound by the covenant when he came of age, though he had told the solicitor of the intended wife that he was of age at the time when he executed the settlement; but that was because the wife herself knew that he was not of age. In *Chubb* v. *Griffiths* (2) an infant defendant was ordered to pay costs.

[JESSEL, M.R.:—That was a case of tort.]

In *Blake* v. *Concannon* (3) lands were let to an infant; he possessed them for nearly a year, and then, being still an infant, he quitted the possession, and on attaining twenty-one shortly afterwards he repudiated the tenancy. It was held by *Pigot*, C.B., that he was liable for half a year's rent which accrued due while he was in possession. The infant was liable for the use and occupation of the land.

[JESSEL, M.R.:—That is founded on an implied contract. How can the Court imply a contract as against a person who is incapable of contracting?]

And in a case in the Year Book (4), it was laid down by *Newton*, J., "If one lease for a term of years, rendering rent, *in fait*, to an infant within age, if he manures the land, a writ of debt is maintainable against him; the cause is he has a *quid pro quo*." So, in the present case, the Appellant has had the coke and breeze.

[JESSEL, M.R.:—That means after he has attained twenty-one. It proceeds on his having adopted the lease.]

At any rate, by filing a liquidation petition, in which he alleged that he had debts, the Appellant is estopped from saying that he is an infant. And, under sub-sect. 12 of sect. 125, the Court has power to make an adjudication of bankruptcy, and no creditor's petition is necessary to found the adjudication: *Ex parte Charlton* (1).

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(1) 4 De G. & J. 458. 5 Jur NS 757

(2) 35 Beav. 127.

(3) 4 Ir. Rep. C. L. 323.

(4) 21 Hen. 6, 31 b.

JESSEL, M.R.:—

This is an appeal from a decision of the Chief Judge in Bankruptcy affirming a decision of the Judge of the County Court, who thought that he was bound, as indeed he was, by the previous decision of the Chief Judge in *Ex parte Lynch* (2), and the Chief Judge was rather following and a little amplifying his decision in *Ex parte Lynch*, than giving a new decision. The facts necessary to be stated are few and very simple. The Appellant is a young man still under twenty-one. He, apparently a considerable time ago, married a widow, who at that time was carrying on the business of a coke and breeze dealer, and after the marriage he continued to carry on the same business. In the course of the business he bought coke and breeze from the Corporation of *Birmingham* on credit, which he has not paid for. Being, as he thought, in difficulties, he filed a liquidation petition in the *Oldbury* County Court, and obtained an injunction to restrain the proceedings in an action which has been brought against him by an alleged creditor for a debt which was supposed to be due from him. At the meeting of creditors summoned under this petition no resolution was passed, and the liquidation proceedings fell through: and thereupon the Corporation of *Birmingham* presented a petition asking for an adjudication of bankruptcy against the Appellant, alleging that he was indebted to them for coke and breeze which they had supplied, and that he had committed an act of bankruptcy by filing the liquidation petition. On that petition an adjudication was made, and the present appeal is against the adjudication. Now the first point we have to consider is whether the infant is liable at all to the Respondents. If he is not a debtor he is not a person who can petition for a liquidation by arrangement, nor can be made a bankrupt. How is it made out that he is a debtor? It is not suggested that the coke and breeze were necessaries, that they were bought for home consumption. It is admitted that they were bought for the purpose of selling them again. Therefore there was no common law liability,

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(1) 6 Ch. D. 45.

(2) 2 Ch. D. 227.

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because an infant could not contract a debt except for necessaries. In the view of our law the fact that he had the goods is not material. If persons choose to supply goods to an infant on credit, they take the chance of being paid. Such is the law, and I am not prepared to say that there is any absurdity or hardship in it, or that it ought to be altered. That is not my province. It is said, however, that a different rule prevails in equity, and that when an infant has committed a fraud by representing that he is not an infant in order to obtain possession of goods, he can be made liable in equity for the misrepresentation. In such cases the Court has taken into consideration the appearance of the infant, for that is a very material matter. If the representation were made by a boy of ten years old, it would be impossible that the person to whom it was made could have relied on it. But if a man who is apparently of full age represents that he is of full age, the person to whom he makes the representation may well be deceived by it. An infant is capable of committing a fraud in equity just as he is capable of committing a crime, and may be made liable for it. But the authorities shew that there must be an express representation and one which would naturally deceive the person to whom it is made. In such a case it has been decided that, if the person who has committed the fraud becomes a bankrupt after he is of full age, the person who has been defrauded can prove in the bankruptcy for the amount of the equitable liability resulting from the fraud. It is difficult to see how those decisions came about, for at the time when they were given liabilities generally could not be proved in bankruptcy as they can be now. Only debts could then be proved. But there is no decision which says that this kind of liability is a legal debt. I use the words "legal debt" advisedly; of course there can be no other debt than a legal debt, but the inaccurate phrase "equitable debt" has crept into the books. But this liability is not really a debt at all, it is only a liability in equity to pay a sum of money, and whenever a debt is required by law in order to found any proceedings, this equitable liability will not be enough.

I have said this because I do not wish to be supposed to overrule those decisions in Courts of Equity to which I have re-

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ferred. But there is nothing of the kind in the present case, and that is the first answer to the whole case. It is admitted that the Appellant made no express representation to the Respondents that he was of full age, and the Respondents' counsel were driven to argue this, that if a person who is an infant, but whose appearance is such that you would not necessarily know him to be an infant, simply carries on business, buys and sells goods, without making any express representation that he is of age, that of itself amounts to a fraudulent representation that he is of full age. Now, the first observation is that you must not invent fraud in that way. There is nothing illegal or improper in an infant's carrying on a trade; thousands of infants do so every day, and the man who deals with an infant on credit trusts to the infant's honour to pay him, as well as to the fact that it is to the infant's advantage to be able to continue carrying on the trade. But no representation that the infant who so trades is of full age arises out of the mere fact of his carrying on the trade. That this is the true view of the law is evident from the judgment of Lord Justice *Knight Bruce* in *Ex parte Unity, &c., Banking Association* (1), which is founded on the fact that express representations were made by the infant, though the Lord Justice does also refer to the appearance of the infant. There is therefore no pretence for saying in the present case that the infant is a debtor, or that any action could be maintained against him by the Respondents. But it is said that the mere fact of his having obtained the goods is enough to make him liable to the Respondents. If that were so it would destroy the whole of the law on the subject and the protection afforded by it to infants. And there is no foundation for saying that the Appellant is liable in equity. Further than that, there is no evidence that he owes any debt at all. Mr. *De Gex*, indeed, suggests that he may owe debts for necessaries, but we have no right without any evidence of debts to say that a man is a debtor. It is impossible, therefore, that the adjudication can be maintained on the petition of the Respondents. But it is said that inasmuch as, under sub-sect. 12 of sect. 125, the Court has power, when a "liquidation by arrangement cannot, in consequence of legal difficulties, or of there being no trustee for the time being, or for any

(1) 3 De G. & J. 63. 4 Jur NS. 1257

sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor," to adjudge the debtor a bankrupt, the present adjudication can be supported under that power. The first observation upon that is, that the Court must have a debtor before it; it cannot adjudicate a man a bankrupt who has no debts. And, in the next place, the Court can only be put in motion under that sub-section by a person who is a creditor and who has a right to intervene in the proceedings. A mere stranger cannot come and ask the Court to adjudicate. The person who applies must shew an interest giving him a right to intervene. If, therefore, the Respondents had no interest as creditors they could not put the Court in motion to adjudge the Appellant a bankrupt.

I think it is not right to part with the case without saying that I respectfully but entirely dissent from the decision of the Chief Judge in *Ex parte Lynch* (1), which must now be considered as overruled. I cannot agree with any of the propositions there laid down by him. In the first place, I am not aware that the law in bankruptcy is well settled "that if an infant has been held out and dealt with as a trader he can be made a bankrupt in respect of a trade debt." In my opinion the law is established the other way. In the second place, I do not agree that "the object of the *Infants' Relief Act* was to protect young persons, not from the consequences of trading, but from extravagant debts incurred for unnecessary articles, such as jewellery," and that it has no application to a case like the present. The words of sect. 1 of that Act are perfectly general, and they apply to all contracts of an infant except those which are expressly excepted, and they cannot be restricted so as not to apply to trade debts. Whatever may have been the motives of the Legislature in passing the Act, the words are of universal application. The last reason given by the Chief Judge, viz., that "by filing a liquidation petition the bankrupt adopted a proceeding which an infant could not lawfully take, and he has also clearly held himself out as an adult trader," also appears to me an inadequate and insufficient reason. An infant does not by filing a liquidation petition acquire full age (we are dealing with a young man who is still under twenty-one);

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(1) 2 Ch. D. 227.

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he cannot by filing such a petition either obtain the advantages or entail on himself the disadvantages of such a proceeding. By adopting a proceeding which would only be valid if he was an adult, he does not make himself an adult; he cannot in that way alter his *status* of infancy. All the reasons for it failing, the decision fails. The appeal must be allowed and the adjudication reversed.

BAGGALLAY, L.J.:—

The petition described the Appellant as a trader. The petitioning creditors were the Corporation of *Birmingham*, who alleged that he was indebted to them in the sum of £180 13*s*. for coke and breeze supplied by them. If there were nothing more in the case than these allegations in the petition, and that was met by proof that the Appellant was an infant when the goods were supplied to him, it could not for a moment be argued that the adjudication could stand. Reliance, however, is placed on *Ex parte Unity Banking Association* (1) and on *Ex parte Lynch* (2). As regards the latter case, I cannot assent to the first proposition of the Chief Judge; if his words are to be understood in their ordinary meaning I most respectfully dissent from them. How far, if the infant had made a direct representation that he was of full age, his misconduct would have made him liable to bankruptcy proceedings, I do not express any opinion. But all that is alleged in the present case is that the Appellant did not declare to the persons with whom he was dealing that he was an infant. In *Ex parte Unity Banking Association* the decision was that where there had been an express representation by an infant trader that he was of full age, the person to whom the representation had been made might prove for the loss which he had sustained under an adjudication made against the trader after he had attained full age. The question was not whether an adjudication could be made. Therefore that case is no authority for supporting the adjudication in the present case if considered as based upon strictly bankruptcy proceedings. But it is said that the presentation by the infant of the liquidation petition makes a difference. He alleged in the petition that he was a trader, and that he was unable to pay his debts, and he presented a statement of debts and assets. The first meeting of the creditors was held, but no resolutions were passed because there was not a proper majority, and the proceedings fell through. *Ex parte Charlton* (1) is referred to as shewing that where there is a difficulty in carrying on liquidation proceedings the Court can adjudicate the debtor a bankrupt without the necessity of presenting a bankruptcy petition. But in that case composition resolutions had been registered and the debtors had failed to perform their engagements, and a bankruptcy petition in the ordinary form had been presented by an undoubted creditor, the debtor being of full age. And the only point decided was that it was not necessary that an act of bankruptcy should have been committed within six months before the presentation of the petition. There was no decision that there need not be a petitioning creditor's debt or a creditor to apply for the adjudication. The Chief Judge has really acted upon his own previous decision in *Ex parte Lynch* (2), and I entirely concur with what the Master of the Rolls has said with regard to that case. I cannot assent to the conclusion at which the Chief Judge there arrived on the several points dealt with in his judgment. We come back therefore to this, that no debt has been proved to have been due to the petitioning creditors at the time when the application for the adjudication was made, and therefore the adjudication cannot be supported.

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(1) 3 De G. & J. 63. 4 Jur NS 1257 (2) 2 Ch. D. 227.

Lush, L.J. :—

The objection to the adjudication is that there is no good petitioning creditor's debt. The alleged bankrupt is under twenty-one years of age, and the claim against him is not made in respect of necessaries supplied to him by the Petitioners, for which an action could be maintained against him, but in respect of goods supplied to him for trading purposes. Now, the law says that, although a person who is under twenty-one does no wrong by trading, he is not liable to pay his trade debts. The protection of infancy is an answer to the claim of any person who has supplied the infant with goods on credit for that purpose. Now the debt of a petitioning creditor must, according to sect. 6 of the *Bankruptcy Act*, 1869, be "a liquidated sum due at law or in equity." At the time when the Act was passed there were some liabilities in equity which were not recognised at law—for instance, the liability to pay money under a decree in equity against a defaulting trustee, and the liability to pay costs directed to be paid by a decree of a Court of Equity—and which could only be enforced by the Court of Equity which had created the liability. The distinction has, I believe, been abolished by the *Judicature Act*, and such a liability may now be enforced by any Division of the High Court. But at the time when the *Bankruptcy Act* of 1869 was passed such a liability could only be enforced in the Court of Chancery. Now the claim of the Respondents against the Appellant is clearly not a debt at law; no action could have been maintained for it. The Appellant could have pleaded infancy, which would have been a good defence to the action. If a claim could have been maintained in equity on the ground that the infant had made an express fraudulent representation to the Respondents that he was of full age, still that would have been only a liability in equity. Mr. *De Gex* says that by carrying on the trade the infant had made a representation that he was of full age. I cannot agree in that view. According to the decisions the representation must, in order to create the liability, be an express representation. There was nothing like that in the present case. The infant only carried on trade. There is nothing illegal or improper in that. So that, if there is any liability at all, there is none in equity as distinguished from law. It is a legal liability, if it is anything at all. But it is said that the Appellant has estopped himself from setting up his infancy, because he himself commenced the proceedings by filing a liquidation petition, in which he stated, as he was bound to do, that he was unable to pay his debts, and admitted by his statement of affairs that he was indebted to the Respondents. There again I entirely differ from the reasoning of the Chief Judge. Sect. 125 of the Act is still dealing with a debtor and with creditors. Sub-sect. 12, no doubt, gives the Court power in certain circumstances to adjudge the debtor a bankrupt. But the Court did not in the present case make the adjudication under that clause; the liquidation proceedings had dropped, and the presentation of the bankruptcy petition was the independent act of the petitioning creditors afterwards, the petition being founded on the act of bankruptcy committed by the filing of the liquidation petition. How the filing of the liquidation petition could in any way alter the infant's *status* of infancy I am utterly unable to conceive, and, in my opinion, he might have raised the objection of infancy at any stage of the proceedings. The filing of the petition had no effect on his *status*. An infant cannot by any false pleading, or by any mistake in pleading, alter his *status*; his immunity remains notwithstanding. There is, therefore, no ground on which we can say that the adjudication ought to stand. I agree that this conclusion involves the reversal of the decision in *Ex parte Lynch* (1); it is impossible when we consider the law on the subject that that decision can stand. But the same thing has really been already decided, not only in the Court of Appeal in *Ex parte Kibble* (2), but also in the Court of Criminal Appeal in *Reg.* v. *Wilson* (3). There a prisoner had been convicted under sect. 12 of the *Debtors Act*, 1869, for that, within four months before the presentation of a bankruptcy petition against him, upon which he was adjudged bankrupt, he quitted *England*, taking with him, with intent to defraud, property which ought to have been divided amongst his creditors. When he quitted *England* and when the adjudication was made he was an infant. The only debts proved in the bankruptcy were trade debts, and there was no evidence that he owed any debts for necessaries. The conviction was set aside on the ground that, being an infant, the prisoner had no creditors capable of being defrauded. That decision was given in 1879, and it is perfectly in accordance with the bankruptcy law. On these grounds I am of opinion that the judgment of the Chief Judge cannot stand.

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(1) 6 Ch. D. 45.

(2) 2 Ch. D. 227.

Willis:—The decision of the Court of Bankruptcy in *Ireland* in *In re Rainys* (4) is entirely in accordance with your Lordships' view.

Solicitors for Appellant: *Swann & Co.*, agents for *Jackson & Sharpe, West Bromwich.*

Solicitors for Respondents: *Sharpe, Parkers, & Co.*, agents for the *Town Clerk, Birmingham.*

(1) 2 Ch. D. 227.

(2) Law Rep. 10 Ch. 373.

(3) 5 Q. B. D. 28.

(4) 3 Ir. L. Rep. (Ch.) 459.

W. L. C.

Ex parte HARRISON. *In re* BETTS.

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May 2.
C. A.
June 30.

Mortgage—Attornment Clause—Distress—Application of Proceeds.

The proceeds of a distress for rent levied under an attornment clause in a mortgage deed are, in the absence of any provision to the contrary in the deed, applicable to the payment of principal as well as interest.

The fact that the yearly rent reserved by the attornment clause is equal in amount to the yearly interest of the mortgage debt as provided by the deed, and is made payable on the same days, is not of itself sufficient to displace the *primâ facie* right of the mortgagee to apply the proceeds of the distress in satisfaction of principal as well as interest.

Hampson v. *Fellows* (1) not followed.

21 ChD 447
22 ChD 479

BY a deed dated the 8th of November, 1873, certain real estates in *Lincolnshire* were conveyed by *R. S. Betts* to *C. C. De Trafford,* Sir *C. H. Tempest,* Bart., and *Laura Ann Riddell,* widow, in fee, subject to redemption on payment on the 8th of May, 1874, of the sum of £12,500, with interest thereon at the rate of £4 15*s.* per cent. per annum.

The deed contained a recital that the mortgagees had agreed to advance the £12,500, upon having the repayment of the same, with interest at the rate of £4 15*s.* per cent. per annum "(reducible upon punctual payment as hereinafter mentioned), secured in manner hereinafter appearing." There was the usual covenant by the mortgagor that, in case the £12,500, or any part thereof, should remain unpaid after the 8th of May, 1874, he would, so long as the same or any part thereof should remain unpaid, pay to the mortgagees interest for the same, or for so much thereof as should for the time being remain unpaid, at the rate of £4 15*s.* per cent. per annum, by equal half-yearly payments on the 8th of November and the 8th of May (or within thirty days next after each of the said days respectively). And the mortgagees covenanted with the mortgagor that, if he should on every 8th of May and 8th of November, so long as the principal sum of £12,500, or any part thereof, should remain unpaid, pay to the mortgagees interest for the £12,500, or for so much thereof as should for the time being remain unpaid, at the rate of £3 15*s.* per annum, then they would accept interest for the £12,500, or for so much thereof as should for the time being remain unpaid, at the rate of £3 15*s.* per cent. per annum for every half-year for which such interest should be paid within thirty days as aforesaid. And the mortgagees covenanted with the mortgagor that, if he should on every 8th of May and 8th of November, until the 8th of November, 1880, or within thirty days next after each of those days respectively, pay to the mortgagees interest for the £12,500 at the rate thereinafter in that behalf mentioned up to the same half-yearly days of payment respectively, and should perform and observe all the covenants and agreements on his part therein contained, then the mortgagees would not before the 8th of November, 1880, call in the principal sum of £12,500, or any part thereof. And it was agreed and declared that the mortgagor, his heirs or assigns, should not before the 8th of November, 1880, compel the mortgagees to receive the £12,500, or any part thereof, unless he should die or should sell the property. The deed contained a power of sale by the mortgagees, and there was the following attornment clause: "And this indenture also witnesseth that for the consideration aforesaid the said *R. S. Betts* doth hereby attorn and become tenant from year to year to the mortgagees, their heirs and assigns, for and in respect of the said premises expressed to be hereby assured, now held and occupied by him the said *R. S. Betts*, at the yearly rent of £593 15*s.*, to be paid by equal half-yearly payments on the 8th of May and the 8th of November, the first half-yearly payment to be made on the 8th of May next. Provided always and it is hereby agreed and declared that it shall be lawful for the mortgagees, their heirs and assigns, at any time, without giving previous notice of their intention so to do, to enter upon and take possession of the said premises whereof the said *R. S. Betts* hath attorned tenant as aforesaid, and to determine the tenancy created by the aforesaid attornment." The rent of £593 15*s.* was equal to a year's interest at the rate of £4 15*s.* per cent. per annum on the sum of £12,500. On the 1st of October, 1879, the mortgage was transferred to Sir *C. H. Tempest*, *Henry Alison*, and Earl *Cathcart*.

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(1) Law Rep. 6 Eq. 575.

After the execution of the mortgage a parol arrangement was made that the half-yearly payments of interest should become due on the 1st of July and the 1st of January, instead of on the 8th of May and the 8th of November, and a payment was made of the proportionate part of the interest from the 8th of May.

On the 1st of March, 1880, *Betts* filed a liquidation petition in the *Lincoln* County Court.

The interest on the mortgage debt was duly paid up to the 1st of July, 1880, a half-year's interest at 3¾ per cent. being paid on the 9th of July by the trustees appointed in the liquidation. On the 1st of June, 1880, the mortgagees gave six months' notice to pay off the mortgage debt. The trustees having advertised a sale of the whole of the mortgagor's effects on the mortgaged property to take place on the 25th of November, 1880, the mortgagees, acting under the attornment clause, on the 19th of November levied a distress on the property for a half-year's rent up to the 8th of November. The trustees contended that the distress was valid only for £162 15*s.* 7*d.*, the amount of the interest on the mortgage debt at 3¾ per cent. from the 1st of July to the 8th of November, 1880. It was arranged that this sum should be retained by the mortgagees, and that the balance should be paid into a bank in joint names, to abide the decision of the Court. An application was then made to the County Court, and the Judge (Mr. *Stephen*) held that the mortgagees were entitled to put in force the distress only for the interest due, and not for principal, and that the trustees were entitled to the money in the bank (1). The mortgagees appealed

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(1) Mr. STEPHEN, in giving judgment, said:—

In this case it does not appear to me that assistance is afforded by any of the cases to which my attention was drawn at the hearing of the application on the part of the mortgagees. In all of the cases so adduced—namely, *Ex parte Williams* (7 Ch. D. 138), *In re Stockton Iron Furnace Company* (10 Ch. D. 335), and *Ex parte Jackson* (14 Ch. D. 725)—the question before the Court was really determined in reference to the value of the rent reserved by the attornment clause as compared with the value of the rent which could *bonâ fide* be reserved for the property to let. It was held that where an attornment was manifestly, by its excess in value, a mere scheme to divert the distrainable goods from proper distribution among the creditors in favour of the nominal landlord, the arrangement was in violation of the bankruptcy law and could not be supported. It was on this ground that the Court of Appeal supported the decision of the Chief Judge in *Ex parte Williams*—that they corrected him in *In re Stockton*—and that they corrected him again in *Ex parte Jackson*. But in the case before me this point does not arise, inasmuch as the to the Chief Judge. The appeal was heard on the 2nd of May, 1881.

Winslow, Q.C., and *J. T. Humphry*, for the Appellants:—

The Judge considered that because the rent reserved by the

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amount of the rent is the same as the amount of the interest, and as this was in respect of about £12,500 advanced on the property in 1873, at which time it may be assumed that the money advanced was greatly below the value of the property, then probably worth £20,000, a rent even of £1000 would not have been out of the way, instead of about £600. The only important thing in reference to the present case which can be drawn from these cases is that such a clause as the present (where the rent is reasonable) is neither against the policy of the bankrupt law, nor, as the law stood when it was executed, liable to the necessity of registration as a bill of sale. It consequently becomes necessary to determine from the deed itself what the intention of the parties was in making it and to construe it accordingly; for the trustees stand exactly in the same position as the mortgagor himself would have done had no proceedings in this Court been taken. Now, in determining this, it seems to me that the coincidence in point of figures between the attornment rent and the interest on the loan is very important. Had the rent been, as I have suggested, considerably greater, say £1000 a year, then it would perhaps have been reasonable to have held that the intention was that, on any day appointed for the payment of the rent, the mortgagees might distrain for the whole of the rent in arrear, giving credit for such interest as had been paid and appropriating the balance, if any, towards the discharge of the principal; but in the present case where the rent was fixed at the same sum as the interest as settled by the deed, and both payable on the same day, it seems difficult to avoid the conclusion that what the parties meant was really this, that both rent and interest were to be one and the same sum, but in the attornment clause it was called rent and invested as such by the operation of the clause with the attributes of rent; and, as such, among other things gave the mortgagee collateral security by enabling him to seize goods by the process of distress in addition to his other remedies. To come to the conclusion that it was intended to be a separate sum distinct from the interest would, I think, make it necessary to hold that at the end of every half-year the mortgagees as landlords might distrain for the whole rent, and, since the execution of the deed, to the extent of six years, without reference to what interest had been paid, and apply the proceeds to the reduction of their principal without having given any notice of their intention to call it in, and such a construction would really be a *reductio ad absurdum* and confute itself. I may add that the case to which I was referred by Mr. *Tweed* of *Hampson* v. *Fellows* (Law Rep. 6 Eq. 575) is as far as it goes against the conclusion that, where all interest and outgoings had been paid at the date of the distress, the proceeds or part of them may be applied in reduction of the principal. But I do not much rely on this decision in the case before me, as the circumstances were very peculiar, and only came before the Vice-Chancellor attornment clause was of the same amount as the interest of the debt, therefore it was the self-same thing, and that it was intended that the mortgagees should not be able to distrain for more money as rent than they were entitled to by way of interest. But this is a pure assumption. It is the same thing as saying that, under the circumstances, the power of distress cannot be used to recover any part of the principal, but to recover the interest only. That a mortgagee is entitled, under ordinary circumstances, to apply a distress in part payment of principal as well as in keeping down interest, is clear from the judgments of the Court of Appeal in *In re Stockton Iron Furnace Company* (1), an authority which the learned County Court Judge himself refers to, and acknowledges. One of the earliest authorities for the doctrine is *Pinhorn* v. *Souster* (2); and one of the latest, *Ex parte Jackson* (3).

There is nothing in the facts or circumstances to warrant the conclusion at which His Honour has arrived. The rent here was not a sham rent; and the change that was made in the days for payment of interest could not affect the days on which the rent was payable.

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on demurrer. Had no alteration been made by the parties as to the times at which the interest was to be payable, there would, therefore, I think, be no difficulty in this case. The whole half-year's interest would have been payable on the 8th of November, when the mortgagees distrained, and they would have been entitled accordingly to the whole as interest, and there would have been no surplus to appropriate, as they now seek, to the reduction of their principal. But in point of fact an arrangement was come to under which the current half-year's interest was not due till the 1st of January next following such 8th of November. It is true that such arrangement was not by deed, but it was an agreement which it is admitted was made and would have been upheld in equity; and the mortgagees would have been restrained from exercising the right of distress beyond the amount of interest which was really due. They must be now, in effect, so restrained by the order of the Court, which will be, that the mortgagees are not entitled to appropriate the surplus of the sum realized by the distress, but to retain only what represents the interest due up to the 8th of November. They are, however, entitled to the costs of the distress; but, as the trustees offered to allow these in the first instance, as appears by the correspondence, they cannot add to those any costs by reason of their having obtained them by the order of this Court.

The result will be that the application of the mortgagees will be dismissed with costs.

(1) 10 Ch. D. 335.

(2) 8 Ex. 763.

(3) 14 Ch. D. 725.

That such a clause as this creates a tenancy from year to year appears from *West* v. *Fritche* (1) and *In re Threlfall* (2). The mortgagees might, in fact, have distrained for a larger amount than they did distrain for.

E. Cooper Willis, for the trustees:—

The case is entirely within the authority of *Hampson* v. *Fellows* (3). The other side must shew that the mortgagees would have been justified in retaining more than the actual amount of interest due at the time of the distress. If the interest should be regularly paid, neither the mortgage money "nor any part thereof" was to be called in for seven years. That provision shews that the only object of the clause was to secure regular payment of interest. If payment of interest did not extinguish rent, the mortgagees might at any time (but for the above clause) have distrained for the whole nominal amount of rent due since the 8th of November, 1873—a construction which would be monstrous. Having these powers, the Appellants are not entitled to take credit for any forbearance.

The frame of the deed being such as it is, the reasoning in *Walker* v. *Giles* (4) applies—that it was not intended by such a deed as this to create a demise.

The cases of *Ex parte Williams* (5), *In re Stockton Iron Furnace Company* (6), and *Ex parte Jackson* (7), turned upon evidence of fraud upon the law of bankruptcy afforded by the amount of rent reserved in attornment clauses; and have no application.

BACON, C.J.:—

The case is entirely covered by authority, and it is needless to discuss the principle which governs it. The contract, as declared by the deed, is plain and specific, and that it is a lawful contract is proved by the cases which have been referred to. The learned Judge whose order is appealed from seems to have thought it was open to him to construe the deed in such a way as to decide that, notwithstanding the covenant, and notwithstanding the terms of the attornment clause, the rent reserved by the attornment clause and the interest of the mortgage debt were one and the same thing. To do this would be not only to disregard the plain meaning of the deed, and that which one knows to be the meaning of the parties, mortgagor and mortgagee, in framing deeds of this kind, but it would be entirely in opposition to the plain decisions which have been pronounced upon the subject. In the case of the *Stockton Iron Furnace Company* (1) I was of opinion in the first instance that the £5000 was an inordinate rent, and that the attornment clause was consequently to be treated as if it was a contrivance to override the law in bankruptcy. The Lords Justices thought it was a not unreasonable rent, and they reversed my decision for that reason; but they affirmed the general principle that, where it cannot be imputed to the transaction that it is a contrivance to evade the principle of the bankruptcy law, there the parties are perfectly at liberty so to contract. The attornment clause forms a security as much for the payment of the principal as for the payment of the interest, and is not to be controlled by the operation of that clause to which Mr. *Willis* has referred, whereby the mortgagees agreed not to call in the mortgage money until November, 1880. Still less is the case affected by the correspondence to which Mr. *Willis* referred. As to *Hampson* v. *Fellows* (2), before Vice-Chancellor *Malins*, I have not the facts so clearly before me that I can express any opinion upon it. If the bill there alleged a case of fraud, a case of agreement between the parties not carried out by the deed, a demurrer to such bill might well be allowed, but, on the cause coming on to be heard, the alleged fraud would have to be investigated. Such a case has no application whatever to the case before me, and still less has *Walker* v. *Giles* (3). In my opinion the order appealed from ought not to have been made. The fruits of the distress belonged to the mortgagees and not to the trustees under the composition deed. There will be a declaration that the mortgagees are entitled to the whole amount of the distress. I also think they are entitled to the costs of the proceedings here and below.

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(1) 3 Ex. 216.
(2) 16 Ch. D. 274.
(3) Law Rep. 6 Eq. 575.
(4) 6 C. B. 662.
(5) 7 Ch. D. 138.
(6) 10 Ch. D. 335.
(7) 14 Ch. D. 725.

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(1) 10 Ch. D. 335.

(2) Law Rep. 6 Eq. 575.

(3) 6 C. B. 662.

From this decision the trustees appealed. The appeal was heard on the 30th of June, 1881.

E. Cooper Willis, for the Appellants:—

Primâ facie, an attornment clause is intended only as an additional security for the payment of the half-yearly interest, and, the interest having been paid, it cannot be put in force. The fact that the amount of the rent is equal to the amount of the interest at the rate fixed by the deed, shews that the clause was intended to be a security for the payment of the interest: *Hampson* v. *Fellows* (1).

[BAGGALLAY, L.J.:—There is no provision as there was in *Pinhorn* v. *Souster* (2) that the rent received under the attornment clause shall go in reduction of the principal.]

Winslow, Q.C., and *J. T. Humphry*, for the mortgagees:—

The effect of the first clause in the deed is to make all the powers given to the mortgagees applicable to the payment of principal as well as interest, unless there is any express exclusion of them afterwards. The agreement not to call in the principal did not extend beyond November, 1880, and notice to call it in was given on the 1st of June, 1880. Of course the mortgagees could not exercise their power of sale until after the expiration of that notice, but after November, 1880, they were at liberty to enforce all their other remedies for payment of principal and interest. The mere fact that the rent is made equal in amount to the yearly interest on the mortgage money is not conclusive to shew that the rent was intended to be a security only for the interest: *In re Stockton Iron Furnace Company* (3). The object of an attornment clause is to give the mortgagee of land of which the mortgagor is in occupation the same benefit as he would obtain, if the land was in the occupation of tenants, by entering into receipt of the rents. In the latter case the rents when received could be applied to the payment of principal as well as interest, unless there was some express stipulation to the contrary.

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(1) Law Rep. 6 Eq. 575.

(2) 8 Ex. 763.

(3) 10 Ch. D. 335, 351.

[BAGGALLAY, L.J.:—Your argument appears to be inconsistent with *Hampson* v. *Fellows* (1).]

But that is inconsistent with what was said by *Jessel*, M.R., and *James*, L.J., in *In re Stockton Iron Furnace Company* (2). There must be express words to exclude the general right of the mortgagee to apply any money he receives by virtue of the mortgage to the payment of principal as well as of interest; the mere coincidence between the amount of the rent and the amount of the interest is not enough. Sometimes, no doubt, an attornment clause is expressed to be "for the purpose of better securing the punctual payment of the interest," as in *Ex parte Punnett* (3), but there is no such limitation in the present case. In *In re Stockton Iron Furnace Company*, Lord Justice *James* said (4) that the effect of the attornment clause was to put the mortgagees in the position of mortgagees in possession, and therefore to make them liable for wilful default; and Lord Justice *Bramwell* (5) adopted the same view.

[LORD SELBORNE, L.C.:—That is to say, as between himself and a subsequent mortgagee, the mortgagee would be treated as in possession of the property. You could not say he was in that position as regards the mortgagor?]

Willis, in reply.

LORD SELBORNE, L.C.:—

We all think that the order appealed from is right. The case stands thus. A large sum of money was lent by the mortgagees to the mortgagor, and there is a recital in the mortgage deed that the mortgagees had agreed to lend the money upon having the payment thereof, with interest, reducible on punctual payment, "secured in manner hereinafter appearing." Then follows an assignment of the property to the mortgagees, subject to redemption and that is accompanied with the usual clauses, including a covenant by the mortgagor for payment of interest; and then there is a covenant by the mortgagees that if the interest is

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(1) Law Rep. 6 Eq. 575.

(2) 10 Ch. D. 351.

(3) 16 Ch. D. 226.

(4) 10 Ch. D. 356.

(5) 10 Ch. D. 357.

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punctually paid they will not call in the principal before the 8th of November, 1880. And it is also agreed that the mortgagor shall not before that day compel the mortgagees to receive the principal debt. Then there is a power of sale, and that is followed by an attornment clause in these words:—[His Lordship read it.] It is "for the consideration aforesaid," the original consideration being the advance of the £12,500. There is nothing more in the deed to shew what it is which is meant to be secured by the tenancy thereby created and the rent payable under it. The original recital in the deed is that the payment of the loan is "to be secured in manner hereinafter appearing," *i.e.*, the principal and interest are to be secured. *Primâ facie*, therefore, the rent reserved by the attornment clause is applicable to the payment of interest when it becomes due, and of principal when it becomes due. We need not enter into any question whether the principal debt had become due before the 8th of November, 1880, for it became due then at any rate. The whole amount of the principal was then due, and part of a half-year's interest. Why is not the fruit of the distress to be applied to the payment of the whole amount due? What is there in the deed to the contrary? There are no express words to the contrary. There is only this, that the amount fixed for the rent coincides exactly with the amount which is made payable for interest on the same days, but which amount is reducible by an act to be done by the mortgagor, and for the doing of which he is allowed thirty days more. There is nothing, however, to suspend the right of levying a distress for the rent during the thirty days; and there can, I think, be no doubt that the mortgagees could distrain at once for the half-year's rent, though as regards the interest they could only retain it at the lower rate. I can find nothing in the deed which says that they are not to apply the fruits of the distress to the payment of the principal of the mortgage debt, and, even if not a shilling remained due to them for interest, I can see nothing to prevent their distraining for the principal. And, as to the arrangement which was made between the parties, changing the days for the payment of the interest, I do not see that it was intended thereby to alter the powers of the mortgagees, or that what was done had any such effect. The payment of the interest

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in July would operate only as a payment on account of the half-year's interest which became due in November. I agree with the Chief Judge that the mortgagees have a right to hold the proceeds of the distress for the payment *pro tanto* of whatever was due to them, whether principal or interest.

BAGGALLAY and LUSH, L.JJ., concurred.

Solicitors for Trustees: *Swann & Co.*, agents for *F. W. Tweed*, *Horncastle.*

Solicitors for Mortgagees: *Cole & Jackson*, agents for *Broadbent, Heelis, & Broadbent, Bolton.*

W. L. C.

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[illegible]

Bankruptcy—Protected Transaction—Elegit—Notice of act of Bankruptcy—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 95.

The delivery to the execution creditor of goods seized by the sheriff under an *elegit*, at the value appraised by the jury on the inquisition, is a sale of the goods within the meaning of sect. 95 (sub-sect. 3) of the *Bankruptcy Act*, 1869, and is protected by that sub-section if the creditor had not at the time of the delivery notice of any act of bankruptcy committed by the debtor prior to the seizure, and available against him for adjudication.

Notice of an act of bankruptcy committed between the seizure and the delivery will not deprive the creditor of the protection.

Ex parte Schulte (1) followed.

Leave given to appeal to the House of Lords.

THIS was an appeal from a decision of Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy.

On the 15th of December, 1880, *George Bannister*, a trader, committed an act of bankruptcy, by neglecting to comply with the requirements of a debtor's summons which had been previously served on him by a creditor. On the 21st of January, 1881, the *Retford and Bassetlaw Loan and Investment Company* recovered judgment against him in an action in the Common Pleas Division for £308 15*s.* 1*d.* and costs, and on the 22nd of January they issued a writ of *elegit*, under which the sheriff of *Middlesex*, on the 24th of

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(1) Law Rep. 9 Ch. 409.

January, seized *Bannister's* furniture and other goods and chattels. On the 2nd of February, *Bannister* filed a liquidation petition, and on the 5th of February notice of the petition was served on the company. On the 10th of February an inquisition was held before the sheriff, and the jury appraised the goods which had been seized at the value of £253 6*s.*, and on the same day the sheriff delivered the goods at that price to the company in part satisfaction of their debt.

At this time the company had no notice of the act of bankruptcy of the 15th of December, or of any act of bankruptcy committed by *Bannister*, except that committed by the filing of the liquidation petition. On the 15th of February, 1881, *Bannister* was adjudicated a bankrupt upon the act of bankruptcy of the 15th of December. The trustee in the bankruptcy claimed the goods which had been delivered to the company, on the ground that the transaction was not within the protection of sect. 95, sub-sect. 3, of the *Bankruptcy Act*, 1869, first, because there had been no sale of the goods; secondly, because, if the delivery by the sheriff to the company was equivalent to a sale, the company had, before the delivery, notice of the act of bankruptcy committed by the filing of the liquidation petition. The Registrar held that the transaction was protected, and that the company were entitled to retain the goods.

The trustee appealed.

E. Cooper Willis, and *J. A. B. M'Connell*, for the Appellant:—

The delivery by the sheriff of goods seized under an *elegit* to the execution creditor is not a transaction protected by sect. 95, sub-sect. 3, of the *Bankruptcy Act*, 1869 (1).

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(1) Sect. 6 defines as an "act of bankruptcy" (*inter alia*),

"(5.) That execution issued against the debtor on any legal process for the purpose of obtaining payment of not less than £50 has in the case of a trader been levied by seizure and sale of his goods."

Sect. 87 provides that "Where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding £50 and sold, the sheriff . . . . shall retain the proceeds of such sale in his hands for a period of fourteen days, and upon notice being served on him within that period of a bankruptcy petition having been presented against such trader, shall hold the proceeds of such sale, after deducting expenses, on trust to pay the same to the trustee; but if no notice of such petition having been presented

There is no sale of the goods which are seized; they are delivered by the sheriff to the execution creditor at the appraised price in satisfaction, or part satisfaction of his debt. In *Ex parte Abbott* (1) it was held that sect. 87 does not apply to an *elegit* because there is no sale of the goods. The object of using an *elegit* rather than a *fi. fa.* is to avoid the operation of sect. 87, and the creditor who has done this cannot afterwards turn round and say that there is a sale under the *elegit*, in order to obtain the protection of sect. 95. He must take the *elegit* for better for worse.

[COTTON, L.J.:—It was held that an *elegit* is not within sect. 87, because there is no sale which puts any purchase-money into the hands of the sheriff. But there may still be a sale.]

If there is a sale by the sheriff the purchase-money would be received by him. Under a writ of *elegit* he is a mere conduit pipe to convey the property in the goods to the creditor; he has no authority to sell them. The fact that the debt is satisfied and that the legal property in the goods passes to the creditor by the delivery does not make the transaction a sale. In *Ex parte Pearson* (2) the handing over of goods seized under a *fi. fa.* to the

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be served on him within such period of fourteen days, or if, such notice having been served, the trader against whom the petition has been presented is not adjudged a bankrupt on such petition, or on any other petition of which the sheriff . . . has notice, he may deal with the proceeds of such sale in the same manner as he would have done had no notice of the presentation of a bankruptcy petition been served on him."

Sect. 95 provides that "Subject and without prejudice to the provisions of this Act relating to the proceeds of the sale and seizure of goods of a trader, and to the provisions of this Act avoiding certain settlements, and avoiding, on the ground of their constituting fraudulent preferences, certain conveyances, charges, payments, and judicial proceedings, the following transactions by and in relation to the property of a bankrupt shall be valid, notwithstanding any prior act of bankruptcy,—(*inter alia*),

"(3.) Any execution or attachment against the goods of any bankrupt, executed in good faith by seizure and sale before the date of the order of adjudication, if the person on whose account such execution or attachment was issued had not at the time of the same being executed by seizure and sale notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication."

(1) 15 Ch. D. 447.

(2) Law Rep. 8 Ch. 667.

execution creditor was held to be a sale on the ground that the transaction was a fraud. In *Ex parte Pillers* (1) it was held that an attachment of a debt by a garnishee order would not be within the protection of sect. 95 unless the debt had actually been paid by the garnishee to the garnishor before an order of adjudication had been made against the judgment debtor.

But, admitting that the delivery of the goods is equivalent to a sale, the fact that the creditor had notice of the filing of the liquidation petition before the delivery prevents him from availing himself of the protection of sect. 95. The words of the section read literally include notice of an act of bankruptcy committed between the seizure and the sale. No doubt in *Ex parte Schulte* (2) it was held that the notice must be a notice of an act of bankruptcy committed before the seizure, but that was a decision of Lord Justice *Mellish* sitting alone, and it is open to review by this Court.

Channell, for the company:—

The transaction is protected. It does not follow that a seizure under an *elegit* is not within sect. 95 because it is not within sect. 87. Sect. 87 requires that there should be, not only a sale of the goods, but a sale the proceeds of which will come into the hands of the sheriff. There is no such requirement in sect. 95. The provisions of the Act relating to acts of bankruptcy committed before and after the proceedings under an execution have been commenced must be kept distinct. Sect. 87 relates to bankruptcy proceedings commenced after the proceedings under an execution have been commenced. This section was fully considered in *Ex parte Villars* (3), and the result of that case is that an execution creditor who commences proceedings under his writ before bankruptcy proceedings are commenced against the debtor, becomes a secured creditor, subject to the qualified right of the other creditors under sect. 87, in the case of a trader, to arrest the proceeds of the sale under the execution if a petition is presented within fourteen days. *Ex parte Abbott* (4) dealt with the question whether the delivery of the goods seized under an *elegit* to the execution creditor is a sale within the meaning of sect. 87. It was held that it is not. But it may still be a sale within the meaning of sect. 95, the objects of which are quite different. Its object, as the introductory words shew, is to protect the creditor against the relation back of the title of the trustee in the bankruptcy to an act of bankruptcy committed prior to the commencement of the title which would be created in the creditor but for the relation back of the trustee's title, *i.e.*, prior to the seizure: *Ex parte Schulte* (1). The principle of sect. 95 is this, that if the creditor's proceeding is a completed transaction before the adjudication, and he has no notice of an act of bankruptcy, it is to prevail against the trustee. This is distinctly laid down in *Ex parte Pillers* (2). In the present case the transaction was completed by the delivery of the goods; nothing more remained to be done. The goods had become the property of the execution creditors. The goods are delivered to the creditor as his property at the appraised value, and then that sum is set off against the judgment debt. That is a sale of the goods at the appraised value. *Blackstone* defines "sale" as "a transmutation of property from one man to another, in consideration of some recompense in value": *Blackstone's* Commentaries (3).

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(1) 17 Ch. D. 653.

(2) Law Rep. 9 Ch. 409.

(3) Law Rep. 9 Ch. 432.

(4) 15 Ch. D. 447.

[LORD SELBORNE, L.C.:—The *Statute of Westminster the Second* (13 Edw. 1, c. 18) gives the creditor the right to elect to take the goods.]

It is an election to buy the goods at the price appraised by the jury, and the delivery is a sale within sect. 95.

Then, what is the act of bankruptcy of which the creditor must have notice in order to deprive him of the protection? *Ex parte Schulte* is a distinct authority that it must be an act committed prior to the seizure, and the same view was taken by Lord Chancellor *Hatherley* in *Ex parte Rocke* (4).

[LORD SELBORNE, L.C.:—The express words of the section are, "had not at the time of the same being executed *by seizure and sale*, notice of *any* act of bankruptcy committed by the bankrupt, and available against him for adjudication."]

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(1) Law Rep. 9 Ch. 409.

(2) 17 Ch. D. 653.

(3) Ed. of 1766, book ii. p. 446.

(4) Law Rep. 6 Ch. 795, 799.

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The notice may be given after the seizure, but the act must have been committed before. The title of the trustee by relation back would not defeat the title of the creditor if there was no act of bankruptcy prior to the seizure. The object of the section is shewn by the introductory words to be the protection of creditors against "prior acts" of bankruptcy. "Available for adjudication" means committed within six months.

Willis, in reply:—

Sect. 87 implies that wherever there is a "sale," the sheriff is to receive the proceeds.

[COTTON, L.J.:—You would say that the delivery by the sheriff to the creditor of the goods seized under an *elegit* is not an act of bankruptcy under sect. 6, sub-sect. 5 ?]

It has never been held to be an act of bankruptcy. A "sale" is equivalent to a "bargain and sale"; there must be a preliminary contract. The seizure and delivery of goods under an *elegit* was not in the contemplation of the Legislature; it is a *casus omissus*. The words are "seizure and sale"; can it be supposed that something different from a sale was intended? Mr. *Benjamin* defines a sale as "a transfer of the absolute or general property in a thing for a price in money": *Benjamin* on Sales (1).

[BRETT, L.J. :—Barter would be a sale, but no money passes.]

There must be a contracting mind. Under an *elegit* the goods are taken and delivered *in invitum*.

[BRETT, L.J.:—Is not a compulsory sale of land to a railway company under the *Lands Clauses Act* a sale within *Blackstone's* definition ?]

Every completed transaction is not a sale. As to the notice, what Lord Justice *Mellish* said in *Ex parte Schulte* (2) was really only a *dictum*. But at any rate this Court can overrule the decision, if it be one. *Ex parte Villars* (3) has no application.

July 28. LORD SELBORNE, L.C., delivered the judgment of the Court (Lord *Selborne*, L.C., and *Brett* and *Cotton*, L.JJ.) as follows:—

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(1) 2nd Ed. p. 1.

(2) Law Rep. 9 Ch. 409.

(3) Law Rep. 9 Ch. 432.

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The question in this case is whether an execution creditor, to whom goods of the bankrupt were appraised and delivered by the sheriff under a writ of *elegit*, issued subsequently to the act of bankruptcy on which the adjudication was founded, but before the adjudication, is protected by the 95th section of the *Bankruptcy Act* of 1869 (sub-s. 3) against the title by relation of the trustee in bankruptcy. The decision of the Registrar was in favour of the execution creditor, and the appeal is by the trustee against that decision. The 95th section does not protect the creditor unless the execution had been "executed in good faith by seizure and sale before the date of the order of adjudication," nor if the creditor "had at the time of the execution being executed by seizure and sale notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication." The title of a creditor to whom at his election goods seized under an *elegit* are appraised and delivered by the sheriff is by the Statute 13 Edw. 1, c. 18, and not by contract. But the effect of the delivery is to transfer the ownership of the goods from the debtor to the creditor, at a price ascertained by the appraisement, so that, if substance is regarded, it is equivalent to a sale to the creditor under a *fieri facias* or sequestration. In *Ex parte Abbott* (1) it was held that such a delivery of goods under an *elegit* is not a sale within the meaning of sect. 87 of the Act. The introductory words of that section, "where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding £50 and sold," were held to be limited by the subsequent context to sales under which the sheriff (or the proper officer of a County Court) would be entitled to receive the proceeds of sale. If there had been no section in the Act material to this question except the 87th and the 95th (the latter of which is expressly made subject to the provisions of the former) I should have doubted whether the word "sale" in the latter section ought to be extended to any mode of transferring the property in goods under an execution or attachment which was not within the word "sold," as used in the former, especially as a statutory transfer by *elegit*

(1) 15 Ch. D. 447.

is not, either in the statute from which its effect is derived, nor (as far as I know) in technical language, described as a sale. But this Act of Parliament also contains the 6th section, defining, by sub-sect. 5, as one of the acts of bankruptcy on which a petition for adjudication may be founded, "execution issued against the debtor on any legal process, for the purpose of obtaining payment of not less than £50," if "levied" (in the case of a trader) "by seizure and sale of his goods." I think that the meaning of these words in the 95th and in the 6th sections must be the same, and I am not prepared to put so limited and technical a construction upon the 6th section as the Appellant's argument requires. Upon this point, therefore, I do not differ from the opinion of the Court below.

The other point as to notice arises in this way. The creditor had notice before the sale (assuming the delivery under the *elegit* to have been a sale), though not before the seizure under that writ, of an "act of bankruptcy committed by the bankrupt and available against him for adjudication," not, indeed, of that act of bankruptcy (prior to the seizure) on which the adjudication proceeded, but of a later act of bankruptcy—viz., the presentation of a petition for liquidation, which, at the time of the (assumed) sale, was available against the bankrupt for adjudication. If this point had been free from authority I should have felt much difficulty in limiting by construction words which, in their natural sense, seem to comprehend notice, at any time before seizure has been followed by sale, of any act of bankruptcy "committed by the bankrupt and available against him for adjudication." This notice would not deprive the execution creditor of any right which he would have had otherwise than by the protection conditionally given to him by this 95th section. If, without that protection, the adjudication would not have overreached his title. it would not overreach it by reason of his having had such notice, That the Legislature might have intended to leave the adjudication to have its ordinary legal effect if, at any time before the execution was perfected by sale, the creditor had notice of any act of bankruptcy available against the debtor for adjudication (whenever committed) would not have seemed to me more improbable or less reasonable than the express provisions of the 87th section, to which (in the case of a trader) the 95th section is subject. But the point is not, in fact, free from authority. Under the Act of 1849 (12 & 13 Vict. c. 106, s. 133), it was decided in *Edwards* v. *Scarsbrook* (1) that the creditor was not deprived of the protection thereby given by notice before sale under a *fi. fa.* of an act of bankruptcy committed by the debtor after the goods were in the hands of the sheriff, on which act of bankruptcy a petition (resulting in adjudication) was presented after the sale. The section there construed differed in several respects (which do not seem to me to be unimportant) from the 3rd sub-section of sect. 95 in the Act of 1869. But in *Ex parte Rocke* (2) Lord *Hatherley* and Lord Justice *Mellish* appear to have considered those differences immaterial. The circumstances of that case did not require the point to be determined. But it again arose in *Ex parte Schulte* (3), and Lord Justice *Mellish*, while deciding against the execution creditor upon another ground, held that the notice mentioned in the 3rd sub-section of sect. 95 in the Act of 1869 was only notice of an act of bankruptcy committed prior to the seizure, relying for that purpose rather upon what he inferred (upon grounds which he thought probable and reasonable) to be the intention of the Legislature than upon any direct examination or criticism of the words of the statute. In this state of the authorities, it is the opinion of my learned Brothers (in which I, not without some hesitation, acquiesce) that, if the construction of the statute adopted by Lord Justice *Mellish* in *Ex parte Schulte* is wrong, it is for a higher tribunal, and not for this Court, to say so. The present appeal, therefore, must be dismissed, and the costs will follow the event.

Willis asked for leave to appeal to the House of Lords.

THEIR LORDSHIPS gave leave.

Solicitor for Trustee: *G. B. Bathurst Norman.*

Solicitors for Company: *H. Allen & Sons*, agents for *Newton Jones & Champion, East Retford.*

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(1) 3 B. & S. 280.
(2) Law Rep. 6 Ch. 799.
(3) Law Rep. 9 Ch. 409.

W. L. C.

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May 2.

In re PIGOTT AND THE GREAT WESTERN RAILWAY COMPANY.

[1880 P. 2414.]

19 Ch.D. 572
573.
22 Ch.D. 155.

Vendor and Purchaser—Railway Company—Unpaid Purchase-money—Interest, from what time payable—Conveyance—Settled Lands—Trustees with Power of Sale—Tenant for Life, Sale by—Lands Clauses Consolidation Act, 1845, ss. 75, 85.

A complete contract being established between a railway company and a landowner by the notice to treat, and an award under the *Lands Clauses Consolidation Act*, 1845, fixing the amount of the purchase-money, the ordinary rules as between vendor and purchaser apply to such a contract, including the liability of the purchasing company, in a proper case, to pay interest on their unpaid purchase-money.

Thus, where the title has not been accepted before the award, and the company, not being in possession, delay paying or depositing the purchase-money, they are liable to pay interest at 4 per cent. per annum, not from the date of the award, but from the time they might prudently have taken possession; that is, when a good title was shewn.

In re Eccleshill Local Board (1) disapproved of.

Where a railway company has given notices to treat to a legal tenant for life under a settlement and to the trustees of the settlement who have a bare power of sale with his consent, and the purchase-money for the life estate is fixed as between the company and the tenant for life by award under a reference to arbitration under the *Lands Clauses Act* in the usual way, the trustees taking no part in the reference, the company cannot require the sale to be completed as a sale by the trustees, but it must be completed as a sale by the tenant for life under the Act.

ADJOURNED SUMMONS.

By a settlement, dated the 18th of July, 1843, certain hereditaments were granted to the use of *Smyth Pigott* and his assigns for his life, with remainder to trustees to preserve contingent remainders, with divers remainders over: and the settlement gave the trustees a power of sale during his life with his consent in writing. No estate in the settled lands was vested in the trustees.

Under the *Bristol and Exeter Railway Act*, 1875, the *Bristol and Exeter Railway Company*—whose rights became, in 1876, vested by amalgamation in the *Great Western Railway Company*—gave to the trustees of the settlement, on the 24th of April, 1876, notice to treat for the sale to the company of certain lands subject to the settlement which were required by them, and on the same day gave a separate notice to *Pigott* and one *Jones* in whom *Pigott's* life estate was then vested.

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(1) 13 Ch. D. 365.

Shortly afterwards *Pigott* and *Jones* duly sent in their claim to the company, stating that they or one of them were or was tenants or tenant for life; but no claim was sent in by the trustees of the settlement, and the amount to be paid by the company was ultimately ascertained as between the company on the one hand and *Pigott* and *Jones* on the other.

The question of compensation having been referred to two arbitrators or their umpire, pursuant to the *Lands Clauses Consolidation Act*, 1846, the umpire, on the 30th of December, 1876, awarded £2000 as the purchase-money and compensation payable by the company to *Pigott* and *Jones* for their interest in the land required.

No contract other than the contract constituted by the matters aforesaid was entered into, and accordingly no time for completion was expressly agreed upon.

Difficulties arose in carrying out the purchase through delay in furnishing the abstract of title, disputes as to the mode of conveyance, delay in arranging with the vendors' tenants, and other causes: the purchase still remained uncompleted, the title not yet having been finally approved; and the tenants still continued in possession of the lands, the vendors receiving the rents.

Towards the latter part of the year 1880, the company being desirous of taking possession, the vendors assented to their doing so on the terms of their depositing the purchase-money in Court and paying interest at 4 per cent. per annum from the date of the award. The company, however, insisted that they ought only to pay interest from the date of the deposit. The vendors, on the other hand, contended that the company were bound to pay interest from the date of the award, the vendors consenting to give credit for the rents and profits received by them since that date.

The company contended, moreover, that the land should be conveyed to them under the power of sale in the settlement, and that the purchase-money should be paid to the trustees exercising the power. Messrs. *Pigott* and *Jones*, however, refused to consent

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to a sale by the trustees, and insisted that the sale ought not to be carried out otherwise than as a sale by a tenant for life under the *Lands Clauses Consolidation Act*, 1845, on payment of the purchase-money into Court.

In order to have the questions as to payment by the company of interest on the purchase-money, and as to the mode of conveyance, determined, this summons was taken out by the company under the *Vendor and Purchaser Act*, 1874.

Davey, Q.C., and *Medd*, for the company:—

Upon the first point we submit that we should not be required to pay interest on the purchase-money, for there is no contract under which interest can be enforced, or by which a time has been fixed for completion; and, moreover, there is no enactment in the *Lands Clauses Consolidation Act*, 1845, making a railway company liable to pay interest except sect. 85, which only provides for the case of the company being desirous of taking possession before agreement. It is to be noticed also that sect. 75 provides for the conveyance to the company, or the execution of a deed-poll, upon "deposit of the purchase-money," simply, nothing being said about interest.

The vendors will probably rely on *In re Eccleshill Local Board* (1), but there possession was taken, which is not the case here.

Then, as to the second point, we submit that a conveyance should be made under the power of sale in the settlement, the purchase-money being paid to the trustees—a simpler and cheaper mode than a conveyance by the tenant for life and payment of the money into Court.

Bagshawe, Q.C., and *Eyre*, for the vendors:—

It is clear that the relation of vendor and purchaser was constituted, and a complete contract established by the notice to treat, and the award fixing the amount of purchase-money; and that the contract was one capable of being enforced by an action for specific performance: *Adams* v. *London and Blackwall Railway Company* (2); *Catling* v. *Great Northern Railway Company* (3); *Regent's Canal Company* v. *Ware* (4). The case is,

(1) 13 Ch. D. 365.

(2) 2 Mac. & G. 118.

(3) 18 W. R. 121.

(4) 23 Beav. 575. 3 Jur N.S. 25

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therefore, we submit, governed by the ordinary rules as between vendor and purchaser, including the rule as to payment by the purchaser of interest on his unpaid purchase-money; and the company should accordingly pay interest from the date of the award: *In re Eccleshill Local Board* (1); *Regent's Canal Company* v. *Ware* (2), the marginal note to which case is inaccurate. At all events, we are entitled to interest from the time a good title was shewn by the abstract and possession might have been taken: *Dart's* Vendors and Purchasers (3). It is only reasonable that the company should, in such a case as the present, pay interest, for the vendor is precluded, by the existence of the contract, from letting or otherwise dealing with the property. As to the mode of conveyance, a sale cannot be made by the trustees as the tenant for life refuses his consent: the sale must therefore be by the tenant for life, in the usual way.

[JESSEL, M.R., referred to *Rhys* v. *Dare Valley Railway Company* (4).]

Davey, in reply.

JESSEL, M.R.:—

There are two questions in this case, and I will deal with the second question first.

The second question is whether the *Great Western Railway Company* were entitled to have a conveyance under a power of sale given to the trustees of the settlement. They gave notices to treat both to the trustees and to the tenant for life, but the proceedings went on on behalf of the tenant for life only. There was a reference to arbitration to which the trustees were not parties, and there was an award finding the amount of the purchase-money under the *Lands Clauses Consolidation Act*: then, of course, the sale became a sale merely by the tenant for life under the powers of that Act, and consequently, as he could make a conveyance as tenant for life, the trustees were not bound to convey. On that point it is clear the railway company were wrong.

The first question, as to payment of interest on the purchase-

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(1) 13 Ch. D. 365.
(2) 23 Beav. 575, 587. 3 Jur
NS 925
(3) 5th Ed. pp. 629, 630.
(4) Law Rep. 19 Eq. 93.

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money by the company, is one of more general importance. Now, I must first of all consider the course of decision, because I must be guided very much by that. The course of decision has been that after notice to treat has been given, and the price has been fixed, but has not been paid, a contract is established which is enforceable in a Court of Equity, and on which an action for specific performance can be maintained. Not only can the vendor bring an action for specific performance, but it has been decided that a railway company can. There are cases where railway or canal companies have instituted actions, or rather filed bills, for specific performance, and have got decrees. I have two reported cases now before me illustrating both points: *Adams* v. *London and Blackwall Railway Company* (1), before Lord *Cottenham*, where the vendor was plaintiff; and *Regent's Canal Company* v. *Ware* (2), before Lord *Romilly*, where the company was plaintiff.

The course of decision then being that specific performance of the contract as a contract of purchase and sale, or sale and purchase, may be enforced, I take it that, unless you find some statutory enactment in the way, all the ordinary rules apply. Consequently, as stated in *Dart's* Vendors and Purchasers (3), where the vendor has shewn his title, the purchaser pays interest from the time at which he might prudently have taken possession, supposing it to have been offered him—that is, the time when a good title was shewn: that is the ordinary rule. That appears to me to meet every objection on the part of the vendor. He says he cannot cultivate his land properly, or he cannot let it properly, with a contract of this kind hanging over him. That would be the case with any contract for sale into which he chose to enter. Of course, if he once enters into a contract for sale, all those inconveniences follow.

Then it is said he is rather worse off where he sells to a railway company, because he has a contract forced on him, so to speak. Still, if it is a contract, it must be a contract of which he can get specific performance; and although it was originally, so to say, made against his will, it has now become a contract enforceable in the ordinary way, and therefore all the consequences of that contract will follow; and the Legislature seems to have taken good care, as regards compensation, and as regards costs, and otherwise, to make him amends for any compulsory sale of the land being forced upon him. It appears to me, therefore, that, subject to the question as to whether there is any statutory enactment to the contrary, the ordinary rule as to vendors and purchasers supplies every possible remedy that is required.

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(1) 2 Mac. & G. 118.

(2) 23 Beav. 575.

(3) 5th Ed. pp. 629, 630.

It is suggested that, in the ordinary case of vendor and purchaser, a man can, if he likes, say, "I will not sell unless you fix a day for completion." That is only a variation of the same argument that in the ordinary case he is at liberty not to enter into a contract at all. If the Legislature thought fit to say that every contract should be deemed to have a time fixed for completion, such as so many months' notice, it would have said so. It has not said so, however, and it appears to me to have left it to the ordinary law.

The only other point I have to examine is this: Is there, as contended for on the part of the railway company, a statutory enactment that the company is not to be in the position of an ordinary purchaser? If this were so, it would be very remarkable, because, though the vendor may be willing—the purchaser, that is, the company, always is willing—the notice to treat is the actual exercise of an option on the part of the purchaser. The company gives the notice to treat because it wants the land: the purchaser is therefore willing; and it would be an extraordinary thing if the Legislature had said, on behalf of such a purchaser as that, that the purchaser should be under a less obligation as regards the payment of interest than an ordinary purchaser. I see no reason for assuming that the Legislature would have so enacted. That does not, of course, decide the question as to whether there is, in fact, such an enactment or not: that must depend on the words of the Act of Parliament. Now, it is not contended for a moment that there is any such enactment in words, but I am asked to infer it from certain provisions which are to be found in the Act. When you are asked to infer a thing, I think the argument of reasonableness has, and ought to have, very great weight. What has sometimes been called the argument of common justice ought also to have great weight: you are not to infer an alteration of the general law if that alteration be against common justice: it would require very strong words to lead to such an inference. I say that, because that must be a consideration in reading the enactments. The enactment in the *Lands Clauses Act* which is relied on as altering the general law is simply this. There are certain provisions as to ascertaining the purchase-money, and under those provisions the company is liable to pay, as a general rule, with some slight exceptions, the costs of ascertaining the amount of purchase-money. Then, after the purchase-money is ascertained, the 75th section says, "Upon deposit in the bank in manner hereinbefore provided of the purchase-money or compensation agreed or awarded to be paid in respect of any lands purchased or taken by the promoters of the undertaking under the provisions of this or the special Act, or any Act incorporated therewith, the owner of such lands, including in such term all parties by this Act enabled to sell or convey lands, shall, when required so to do by the promoters of the undertaking, duly convey such lands to the promoters of the undertaking, or as they shall direct; and in default thereof, or if he fail to adduce a good title to such lands to their satisfaction, it shall be lawful for the promoters of the undertaking, if they think fit, to execute a deed poll," and vest the lands in themselves, and thereupon all the estate and interest in such lands shall vest in the company as against all parties therein named. Now, no doubt, in the ordinary case, where interest is payable, the vendor is not bound to convey till his purchase-money and the interest thereon are paid to him; but the mere fact of his conveying without the payment of the interest would not deprive him of the interest: and in some cases, as we know, he has got interest even after the conveyance. So it is not conclusive that, because on payment the vendor is bound to convey, he therefore loses the interest when he is entitled to it.

Then there is another section which has been relied upon, and which appears to me rather to confirm that view. Under the 85th section, if the railway company want to take possession before the purchase-money has been agreed upon, they may do so on depositing the value and giving a bond; and the bond is for the purchase-money or compensation together with interest thereon at the rate of 5 per cent. per annum from the time of entering

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on the lands. Mr. *Davey* said you find there a provision as to interest; so you do; but it is a simple provision for interest; that is, interest is only secured by a bond; and it does not enact that the company shall pay interest, but that they shall give a bond for the payment of the purchase-money and interest at the rate of 5 per cent., the ordinary law of Equity only giving 4 per cent.: so there was a reason for the enactment. But it does appear to me, and it was conceded in fact by Mr. *Davey*, that, nothwithstanding that under the 75th section the vendor must convey without receiving his interest (for under the 75th section, the moment the purchase-money is ascertained and paid into the bank, the vendor must convey, though he may be entitled to interest), he is only left to enforce the interest under his bond. Therefore that shews at once that the 75th section does not exclude interest merely because the vendor is bound to convey; and that being so, I think it is plain that, as this does not exclude him in that one case, it must not be held to exclude him in other cases. The mere fact, therefore, of the Act directing a conveyance on payment of the purchase-money without saying anything as to payment of interest, does not, to my mind, preclude the application of the general law as to the liability of the purchaser to pay interest in a proper case; and it does appear to me that to decide otherwise would be to commit something like a great injustice, because, after notice to treat has been received, the owner of the land can no longer deal with it in the same way as if there had been no notice; he cannot either improve it, or let it, or deal with it at all satisfactorily, and he can only rely on his right to compel the railway company to complete.

It has always been said that if you have the right to compel a thing to be done by action, the right never can depend on the mere bringing of the action. The action does not create the right; it only enforces the right previously existing: and if, therefore, a vendor is entitled to maintain an action for specific performance against a railway company under the ordinary rules as to specific performance, he is entitled, independently of bringing an action to enforce it, to the benefit of those rules which govern specific performance, including the rule as to payment of interest on unpaid purchase-money: otherwise wilful delay on the part of

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the company, the voluntary purchaser, in payment of the purchase-money after taking and holding possession for a very great number of years, would inflict a serious injury on the vendor, because he could not get his full amount of rents, not being able to let the land in the ordinary way.

It seems to me that the statutory enactments do not exclude the application of the ordinary law; and, therefore, I decide that the vendor in this case is entitled to interest in accordance with that law. Some cases have been cited which do not appear to me to have any direct bearing on the subject. The cases rather assume that this is the law than decide it; but there is certainly one case, *Regent's Canal Company* v. *Ware* (1), where the company was plaintiff, and the title having been accepted before the amount of purchase-money was ascertained by the award, interest was given from the date of the award. The cases, as I said before, seem rather to assume that interest is payable.

There is one case before Vice-Chancellor *Bacon*, *In re Eccleshill Local Board* (2), where he adverted to the fact of the verdict of the jury having been given, and he held interest to arise from that moment, though possession was not taken until afterwards. I am quite unable to understand the principle on which that case proceeded. I am not embarrassed by it, because I have no verdict of a jury to deal with in this case; but I am free to confess that if I had had that case to deal with, I should not have been able to decide it otherwise than I have decided the one before me.

The company must therefore pay interest at 4 per cent. per annum on the purchase-money from the time when they might have taken possession or entered into the receipt of the rents, on a good title being shewn; and they must pay the costs of this adjournment into Court.

Solicitors: *R. R. Nelson; Merediths, Roberts, & Mills,* agents for *Bakers, Phillott, & James, Weston-super-Mare.*

(1) 23 Beav. 575. 3 Jur N S 924

(2) 13 Ch. D. 365.

G. I. F. C.

In re BIRMINGHAM AND LICHFIELD JUNCTION RAILWAY COMPANY.

M. R.
1881
May 28.

Railway Company—Abandonment—Parliamentary Deposit—Judgment Creditor—Undertaking—Receiver — Unpaid Calls — Railway Companies Act, 1867 (30 *&* 31 *Vict. c.* 127), ss. 4, 31, 35—*Abandonment of Railways Act,* 1869 (32 *&* 33 *Vict. c.* 114).

A railway company which has never commenced to acquire the lands or construct the railways authorized by their Act is not an "undertaking," within the meaning of sect. 4 of the *Railway Companies Act*, 1867, of which a receiver can be appointed under that section.

Semble, the powers of a receiver appointed under the above section do not extend to getting in unpaid calls.

PETITION.

The *Birmingham and Litchfield Junction Railway Company* was incorporated by an Act of Parliament passed in 1872, and by that Act an agreement was confirmed which had been come to between the company and one *Hewitt*, whereby, in consideration of *Hewitt* withdrawing his opposition to the bill, the company agreed to pay him the sum of £1200.

In May, 1873, *Hewitt* commenced an action against the company in respect of the £1200 which had been agreed to be paid him, and in July of the same year signed judgment against the company for £1274 1*s.* 2*d.*

By an Act passed in 1874, the company was authorized to make and maintain certain railways therein described, and the 27th section of that Act, after reciting that £1780 had been deposited in the Court of Chancery in pursuance of the Standing Orders of both Houses of Parliament in respect of the application to Parliament for the Act, contained the usual enactment that the sum so deposited should not be repaid unless the company should previously to the expiration of the period limited by the Act for completion of the railways, either open the railways or prove to the satisfaction of the Board of Trade that the company had paid up one-half of the amount of the capital authorized to be raised by means of shares, and had expended for the purposes of the Act a sum equal in amount to such one-half of the capital.

Sect. 28 of the same Act was the common form section generally inserted in private Acts authorizing undertakings, enacting that the deposit-money, after payment of compensation (if any) "shall either be forfeited to Her Majesty . . . . or in the discretion of the Court if the company is insolvent and has been ordered to be wound up, or a receiver has been appointed, shall wholly or in part be paid or transferred to such receiver, or to the liquidator or liquidators of the company, or be otherwise applied as part of the assets of the company for the benefit of the creditors thereof."

The company never gave any notice to treat for and never purchased any lands under the powers conferred by the Acts of 1872 and 1874, and the railways authorized by the Acts were never commenced, nor had the company paid up one-half of the capital by the Act of 1874 authorized to be raised by means of shares, nor expended for the purposes of the Act a sum equal to one-half of the capital.

The sum of £1274 1*s*. 2*d*. being still owing to *Hewitt*, with an arrear of interest from July, 1873, and there being in Court the sum of £1942 14*s*. 1*d*. New £3 per Cent. Annuities, representing the deposit money of £1780, *Hewitt* presented this petition, asking that a receiver of the undertaking of the company might be appointed, and that an inquiry might be directed what compensation (if any) was due to any landowners, and that the fund in Court might be paid to the receiver and applied by him, after satisfying all claims (if any) in respect of compensation in payment of the amount due to the Petitioner by virtue of his judgment, and to the other creditors of the company according to their priorities.

H. B. Buckley, for the Petitioner:—

The Petitioner has applied to the Board of Trade for a warrant of abandonment, but the Board has declined to grant the warrant, giving as a reason that the provisions of the Acts for abandonment of railways apply only to the case of a railway authorized to be constructed by an Act of Parliament passed prior to the *Railway Companies Act*, 1867, and that being so, this company cannot be wound up under the *Abandonment of Railways Act*, 1869. The only remedy the Petitioner has is to obtain the appointment of a receiver of the undertaking under the 4th section of the *Railway*

Companies Act, 1867. The Petitioner is a *bonâ fide* creditor, and his debt is scheduled to the Act incorporating the company. Whenever the judgment creditor of a railway company is unpaid, the appointment of a receiver or manager is a matter of right: *In re Manchester and Milford Railway Company* (1). If a receiver were appointed he would get in any unpaid calls there may be, and we believe that there are still some unpaid calls.

It is inequitable that the Petitioner, who is a meritorious creditor, should be without remedy because the Board of Trade has no authority to grant a warrant of abandonment.

[*In re Bradford Tramways Company* (2) and *In re Lowestoft, Yarmouth, and Southwold Tramways Company* (3) were also referred to.]

Whitehorne, Q.C., for the directors who paid the deposit, supported the petition.

Brooksbank, for the company.

Stirling, for the Crown, was not called upon, but referred to *Gardner* v. *London, Chatham, and Dover Railway Company* (4) as to the meaning to be put upon the word "undertaking."

JESSEL, M.R.:—

I regret to say that I cannot assist the Petitioner. It does appear to me that what the Legislature intended was that these *bonâ fide* debts should be paid, but upon the condition that there should be either a winding-up order or a receiver. Neither of these conditions has been complied with in this case. Then the suggestion is that I could appoint a receiver. Well, there is no power to appoint a receiver anywhere applicable to this case. The 4th section of the Act of 1867 obviously does not apply to a case where there is no undertaking. Here the railway company never had any railway nor any property. This sum of money which was paid in by the promoters never belonged to the company, and though in certain events if it were assets of the company it could be applied in paying the debts, yet it never was assets

(1) 14 Ch. D. 645.
(2) 2 Ch. D. 373; 4 Ch. D. 18.
(3) 6 Ch. D. 484.
(4) Law Rep. 2 Ch. 201.

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of the company, and therefore there is no receiver of that to be appointed. Then it is suggested they may get some money from calls, but the answer to that is, that the 4th section never was intended to preclude the creditor from what used to be called his remedy by *scire facias* to get the unpaid calls. A creditor is not precluded from that by the appointment of a receiver; the receivership does not extend to unpaid calls. The meaning of the section was to prevent the creditors interfering with the working of the railway, but not to prevent their getting calls which they had a right to get, and therefore a receiver of the works of the undertaking means the railway or works as a going concern, and includes the rolling stock and everything else; but if there is no rolling stock what is the receiver to do? After the provision for working expenses and other proper outgoings in respect of the undertaking the money is to be applied in payment of the debts, but there is no undertaking in this case within the 4th section. Therefore there is nothing I can appoint a receiver of. There is no power of appointing a receiver where the company has no property that I am aware of. The only other thing was to obtain the warrant of the Board of Trade, and the Board of Trade declined to grant a warrant. I suppose if they did grant a warrant I could act whether they had power to grant it or not, and it is equally clear, I should say, if they do not grant it, whether they have power to grant it or not I cannot act. Whether or not they have power to grant it they have not granted it. I cannot compel them to grant it, and therefore I cannot act in this matter. It certainly seems to me to be immaterial to inquire whether they have or have not power to grant it, but I must say if they have not the power they ought to have it; but that is a thing I cannot grant, it must be granted by the Legislature. Under those circumstances I can afford the Petitioner no present relief, and all I can do is to dismiss his petition. Then, as regards the parties who appear, there are three; first of all, there is the Treasury, which has a very ample fund, called the consolidated fund, to fall back upon, and counsel for the Treasury very properly left the matter of costs in the hands of the Court. It is not a case for asking for costs against this unlucky Petitioner, and, therefore, acting on that very proper submission on the part of the Treasury, I shall make no order as to their costs, neither shall I give any costs to the company nor the directors who appear. The petition will therefore be dismissed without costs.

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In re BIRMINGHAM AND LICHFIELD JUNCTION RAILWAY CO.

Solicitors: *H. R. T. Alexander; Tilleard, Godden, & Holme; Kendall, Price, & Francis; Hare & Co.*

G. M.

V.-C. B.
1881
May 6.

In re CLARKE.
BARKER *v.* PEROWNE.

[1879 C. 174.]

Tenant for Life and Remainderman—Investment—Dividends—Apportionment.

A testator after the *Apportionment Act*, 1870, bequeathed £—— to trustees, such sum to carry interest at 4½ per cent. until the same should be paid or appropriated, upon trust, with the consent of his wife, to invest the same in certain specified securities, and to pay the annual income of the legacy and the investments thereof, including in such income the interest payable in respect of such legacy, to his wife for life, with remainders over.

Interest was paid to the widow up to the day when, pursuant to an order of the Court, the bequeathed sum was invested in stocks on some of which five months' dividend had then accrued:—

Held, that the Apportionment Acts did not apply, and that the widow was entitled to the whole of the dividends when received upon the purchased stocks.

ADJOURNED SUMMONS.

By his will, dated the 11th of September, 1873, *J. J. Clarke* gave and bequeathed to the trustees thereof the sum of £6000 (increased by a codicil to £15,000), "such sum to carry interest at the rate of 4½ per cent. per annum from the day of my death until the same shall be paid or appropriated, Upon trust with the consent of my wife *Caroline Mary Clarke* to invest the same upon any of the stocks, funds, shares, or securities hereinafter authorized for the purposes of investment, with power with such consent as aforesaid to vary such investments for others of a like nature, and to pay the annual income of the said legacy and the investments thereof, including in such income the interest payable in respect of the said legacy as aforesaid, unto my said wife during her life, and if and while covert for her sole and separate use and without power to deprive herself of the benefit of the said income or any part thereof by anticipation." The will also contained directions as to the trusts of the £6000 (£15,000) and the stocks, funds, shares, and securities which might represent the same, after the death of his widow.

The testator died on the 7th of March, 1879, and his widow *Caroline Mary* had since married *George Sharpe Grimble*.

By an order made in this action on the 26th of February, 1880, the trustees of the will were directed on or before the 8th of March, 1880, out of the personal estate of the testator, to raise the sum of £15,000, together with £124 4*s.* 2*d.* for interest thereon to the 8th of March, 1880, at the rate of 4½ per cent. per annum, making together £15,124 4*s.* 2*d.*, being the amount due to them in respect of the legacy of £15,000 and interest by the testator's will bequeathed upon trust for the said *C. M. Grimble* for her life. And the trustees were directed to retain and hold the said sum of £15,124 4*s.* 2*d.* upon the trusts by the will declared of and concerning the legacy of £15,000.

On the 6th of March, 1880, the trustees raised the sum of £15,000 by a sale of consols, and placed the same at deposit at the *London Joint Stock Bank* at the current rate of interest (2 per cent. per annum).

On the 26th of March, 1880, the trustees paid to Mrs. *Grimble* the sum of £124 4*s.* 2*d.* for interest on the legacy of £15,000.

On the 27th of May, 1880, the sum of £15,000, which had been deposited at the *London Joint Stock Bank*, was withdrawn by the trustees and invested by them in the purchase of £4620 4 per Cent. Debenture Stock of the *North Eastern Railway Company*, with interest thereon from the 28th of May, 1880; £4500 4 per Cent. Debenture Stock of the *Great Western Railway Company*, with the accruing half-year's dividend payable thereon on the 1st of July, 1880; and £4478 4 per Cent. Debenture Stock of the *London and North Western Railway Company*, with the accruing half-year's dividend thereon payable on the 15th of July, 1880.

The sum of £67 7*s.* 11*d.* was received by the trustees from the *London and Joint Stock Bank* for interest on the deposit, and by them paid to Mrs. *Grimble*.

The trustees had also received the following sums for interest:—

July 5, 1880. £16 7*s.* 2*d.*, being interest from the 28th of May to the 30th of June, 1880, on the £4620 4 per Cent. Debenture Stock of the *North Eastern Railway Company*. This sum had been paid to Mrs. *Grimble*.

July 15. £87 10*s.* 1*d.*, half-year's interest on the £4478 4 per

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Cent. *London and North Western Railway Company's* Debenture Stock due to the 15th of July, 1880.

£87 18*s.* 9*d.*, half-year's interest on £4500 4 per Cent. *Great Western Railway Company's* Debenture Stock due to the 30th of June, 1880.

Having declined to pay over the two last sums without an order of the Court, on the ground that if they were to do so Mrs. *Grimble* would receive interest from the 1st of January to the 28th of May, 1880, twice over, the question whether Mrs. *Grimble* was entitled to them without apportionment was raised by summons taken out on behalf of Mrs. *Grimble.*

The Chief Clerk, following the rule laid down by Vice-Chancellor *Kindersley* in *Scholefield* v. *Redfern* (1), held that Mrs. *Grimble,* as tenant for life of the legacy, was entitled to the half-year's dividends which became due on the investments in question on the first day for payment of dividends next after the day on which the investments were made.

The summons had been adjourned into Court.

Hemming, Q.C., and *Kingdon*, for Mrs. *Grimble* :—

The Court will not make any apportionment or special calculation as between tenant for life and remainderman of the gain or loss of income from the nearness or remoteness of the time of investment to or from the day when dividends are payable, as the gain to either party would be far more than compensated by the expense and grievous burden to the estate which would be incurred from the complex investigation necessary to be made: *Scholefield* v. *Redfern*; *Freeman* v. *Whitbread* (2); and the only cases in which this sort of equity has been administered are those in which there have been circumstances of such a special and exceptional character as to justify the Court in departing from that which is a general rule, as, for instance, in *Lord Londesborough* v. *Somerville* (3); *Bulkeley* v. *Stevens* (4).

The *Apportionment Act,* 1870 (33 & 34 Vict. c. 35), applies only where there is a determination or change of interest, not where, as here, there is merely a change in the amount or time of payment of income.

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(1) 2 Dr. & Sm. 173. 9 Jur NS 485.
(2) Law Rep. 1 Eq. 266.
(3) 19 Beav. 295.
(4) 3 N. R. 105.

Horton Smith, Q.C., and *Heath*, for persons interested in remainder:—

This case is governed by the *Apportionment Act*, 1870, and Mrs. *Grimble* is only entitled to so much of the dividends on the *Great Western Railway* and *London and North Western Railway* debentures as has accrued since the 27th of May, when the investment was made, and the £15,000 thereby became "appropriated." If the trustees had purchased X.d., they would have got a larger amount of stock, and the tenant for life cannot be allowed by reason of the delay, which has reduced the amount of purchased stock, to receive the dividends twice over. Even under the former Act (4 & 5 Will. 4, c. 22) the dividends would have been apportionable: *Shipperdson* v. *Tower* (1); *St. Aubyn* v. *St. Aubyn* (2); *Donaldson* v. *Donaldson* (3); *à fortiori* under the present Act (33 & 34 Vict. c. 35), which has extended the principle of the former Act so as to make it applicable to every form of reservation of income: *Clive* v. *Clive* (4); *Pollock* v. *Pollock* (5). Unless an apportionment is directed, Mrs. *Grimble*, who has received interest up to the 8th of March, 1880, and also the deposit interest until the 27th of May, will get interest twice over. According to the general rule, in order to prevent an excessive payment to the tenant for life the dividends just received ought to form capital: *Seton* (6); *Re Ingram's Trusts* (7).

Speed, for the trustees.

BACON, V.C.:—

The *Apportionment Act* is now reasonably familiar to us, and the principle is perfectly well established, that where a person has a limited interest in a fund and his estate determines between two periods of payment, the new owner is not entitled to the whole of the income since the last period of payment. A case exactly like this has never, I believe, come before the Court until now. Every one of those cases which have been referred to was a case which came within the spirit and policy, if not within the very words of the Act. There has been no case like the present where the testator directs £15,000 to be taken by his trustees out of his estate, and to be held for her benefit for her life with remainders over, and on that sum 4½ per cent. to be paid until it has been invested. Whatever is done with it, his legatee during her life is to have the whole benefit of it. What has that to do with the *Apportionment Act?* The trustees take the £15,000, and deposit it, with the assent of the tenant for life, in a bank. She consents to take the interest paid by the bank. Then, in the exercise of their discretion and with her consent, the trustees lay out her £15,000—for hers it was then—in the purchase of a fruit-bearing fund. They buy certain stocks and hold them on the trusts declared by the will, which are for the widow for life with remainders over. The case, in my opinion, is not governed by the Apportionment Acts or by the cases decided upon them, but the will and the order of the Court decide the matter. The will says that she shall have 4½ per cent. until the fund is paid and appropriated, and the trustees are to do the best they can with the £15,000, and whatever they do with it she shall have the benefit of the investment. The order directs the money to be raised for her benefit. No one else has any claim upon it, for nothing can be done without her consent. In my opinion there is no such question as that which has been argued. By the terms of the will 4½ per cent. is payable until appropriation, and then she is to have the income arising from the investment. It was appropriated and invested with her consent, and by the very words of the will she is entitled to every shilling of the interest.

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(1) 8 Jur. 485.
(2) 1 Dr. & Sm. 611.
(3) Law Rep. 10 Eq. 635.
(4) Law Rep. 7 Ch. 433.
(5) Ibid. 18 Eq. 329.
(6) 4th Ed. p. 490.
(7) 11 W. R. 980.

The summons must be allowed.

Solicitors: *Rose & Fry; C. M. Barker; Lindsay, Mason, & Greenfield.*

F. G. A. W.

In re SMART.

SMART *v.* SMART.

[1878 S. 573.]

V.-C. B.
1881
July 2, 5.

Copyholds—Custom of Descent—Jus Representationis.

The custom of a manor was stated to be that all copyholds descended to the youngest son or daughter, brother or sister, uncle or aunt.

A tenant died intestate seised of customary lands of the manor, leaving neither son, daughter, brother, sister, uncle, nor aunt; but leaving sons of deceased uncles:—

Held, that the youngest son of the youngest uncle was not entitled, and that the heir-at-law was entitled to the lands.

SAMUEL SMART died intestate on the 12th of December, 1878, seised of copyholds of the manor of *Singleton, Sussex.* He had survived both his parents, and died leaving neither son, daughter, brother, nor sister. He had had both uncles and aunts, but none were living at his death. There were, however, sons of uncles living at his death.

The steward of the manor deposed as follows:—

1. "The custom of the said manor with regard to descent is stated generally on the court rolls of the said manor as follows,—viz.: 'The custom of the said manor is that all copyholds descend to the youngest son or daughter, brother or sister, uncle or aunt.'

2. "The custom of the said manor is not stated generally, nor is it, I believe, stated in reference to any particular case on the court rolls as to more remote collateral relations. In one instance it is stated that a certain person, as the youngest nephew, was the customary heir of a deceased tenant, but such nephew was not admitted, as the tenant had devised his copyholds held of such manor to other persons, who were admitted thereto as such devisees."

The Plaintiff, who was the youngest son of the youngest uncle who left sons, of the intestate, claimed the copyholds as against the heir at common law.

The Chief Clerk having found in favour of the Plaintiff, a summons was taken out on behalf of the heir-at-law to vary the certificate.

Everitt and *Jemmett*, for the heir-at-law :—

The customs of borough English and gavelkind are both customs of which the law takes notice; but "if you set forth a particular custom, whereof the law takes no further notice than as you allege it, there the custom shall be taken strictly as you allege it, and shall extend no further;" per *Bridgman*, C.J., in *Payne* v. *Barker* (1) cited in *Rider* v. *Wood* (2). There are no words relating to inheritance or descent in the statement of the custom in this case.

One of the most recent decisions is *Muggleton* v. *Barnett* (3), in which, not without diversity of opinion amongst the Judges, the Courts of Exchequer and Exchequer Chamber decided against the heir by the custom to the last purchaser, on the ground that the person of whom he was the customary heir was not the person last seised. In this instance the Plaintiff's father was never seised.

The decision in *Denn* v. *Spray* (4) was as follows: "A custom within a manor that lands shall descend to the elder sister, where there is neither a son nor a daughter, does not extend to an eldest niece; but the lands must descend according to the rules of the common law, in default of such a son, daughter, and sister." This authority seems to be conclusive in favour of the heir-at-law in the present case.

In *Locke* v. *Colman* (5), the custom of the manor (*Taunton Deane*, in *Somerset*) was stated to be that upon the death of a tenant, leaving neither wife, child, nor brother surviving, the customary estate descended to the youngest sister. The tenant having left a wife and child, and the wife's and child's interests having become determined, the question was, whether, by the custom stated as above, the youngest sister could exclude the heirs of the tenant's deceased brother; and it was held that in order to do this, she must prove substantially that the custom derogated to this extent from the rules of common law.

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(1) Sir O. Bridgman, 18, 25.
(2) 1 K. & J. 644, 655.
(3) 1 H. & N. 282; 2 Ibid. 653.
(4) 1 T. R. 466.
(5) 1 My. & Cr. 423.

W. Karslake, Q.C., and *Grosvenor Woods*, for the Plaintiff:—

We do not dispute the proposition that the heir-at-law takes, if the Court is satisfied that the custom does not extend to the youngest son of a youngest uncle. But is there sufficient evidence to satisfy the Court that the custom does not so extend? The second paragraph of the steward's affidavit shews that in one instance it was stated that a youngest nephew was the customary heir; and *Roe* v. *Parker* (1) shews that an entry in the court rolls stating the mode of descent is admissible, though no instances of any persons having taken according to it be proved.

[BACON, V.C.:—The affidavit goes on to state that the nephew was not admitted; and although the reason for such non-admission is suggested to have been, that there was a devise, I cannot admit the statement or the suggestion as valid evidence of custom.]

G. Woods (in continuation):—In *Muggleton* v. *Barnett* (2) the custom was proved to be that the land descended to the youngest son of the person last seised; if such youngest son were dead without issue, then to the next youngest son; if none, to the daughters as parceners; if no issue, then to the youngest brother; if he were dead, to his youngest son; if no issue of the youngest brother, then to the next youngest brother; if no brothers, then to the sisters as parceners. The custom had also been extended to the youngest son of the uncle of the person last seised, which would include the uncle himself, and to the youngest sons of two sisters, co-heirs of the person last seised. The plaintiff was the youngest son of the youngest brother of the first purchaser, and his father, had he been alive, would have been the great great uncle of the person last seised. He was, in fact, a collateral more remote in degree than those with respect to whom instances of admission had been proved. The case was argued originally before Mr. Justice *Willes*, who decided in favour of the plaintiff. On the appeal in the Court of Exchequer, Chief Baron *Pollock* and Baron *Martin* decided against the plaintiff's claim, and accordingly the judgment of the Court below was reversed. Baron *Martin* added that if the point had been *res integra*, he should have been in the plaintiff's favour, and Baron *Bramwell* dissented from the rest of the Court. In the Exchequer Chamber, the judgment of the Court of Exchequer was affirmed: the members of the Court who decided against the plaintiff's claim being *Coleridge, Wightman, Cresswell*, and *Crompton*, JJ.; and the dissenting minority being *Cockburn*, C.J., *Erle* and *Williams*, JJ. Six Judges were of one opinion and five of the other; and had it not been that Baron *Martin* considered himself bound by the authorities, the majority would have been in favour of the plaintiff.

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(1) 5 T. R. 26.

(2) 1 H. & N. 282; 2 Ibid. 653.

The view on which we rely is that expressed by Baron *Bramwell* (1): "I fully agree that if it were proved that the custom prevailed to a certain extent, as upon a special verdict, we should have no right to extend the custom beyond the actual proof; but the question we have to determine is, what is the custom? A variety of instances were proved in which the nearest youngest male relative of the person last seised took; and may we not infer from thence that there is within the manor this canon or principle of descent, that the nearest youngest male relative shall invariably be found out? It appears to me that we must either look at the actual instances of succession proved, as arising from some original arbitrary rule of those who had the power of determining the right of succession in that manor; or we must refer them to some general rule depending on principle. It seems to me more natural and more logical to attribute them to a rule of general application depending on principle, than to a mere arbitrary rule; and to say that the founder of the rule of descent in the manor determined, not merely that the youngest son should take, and failing sons the youngest brother, and failing sons and brothers the youngest uncle, and failing sons, brothers, and uncles the youngest sons of the youngest uncles, but that also in all other cases the same rule of descent should prevail."

In *Doe* v. *Sisson* (2) there was reputation of a custom that, in default of sons, the land should go to the eldest daughter; in default of sons and daughters, to the eldest sister; and in case all

(1) 1 H. & N. 296, 297.

(2) 12 East, 62.

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were dead, that "the descendants of the eldest" should take; but there were no instances beyond a taking by the son of an elder sister. The Court of King's Bench held that the reputation was evidence to go to the jury of the existence of the larger custom, in favour of the grandson of an elder sister.

It is a general proposition that in customary descent the *jus representationis*, as an ordinary incident of descent, attaches to the custom: *Hook* v. *Hook* (1); *Clements* v. *Scudamore* (2); *Williams* on Seisin (3).

In *Rider* v. *Wood* (4) it was found that the custom of descent was to the youngest son or daughter or sister of the copyholder "last seised;" and if the custom here had been found to be in these express terms, the Plaintiff would necessarily be excluded. But the custom as stated here has nothing to say about the copyholder "last seised." *Locke* v. *Colman* (5) merely decided that the custom, in order to exclude the *jus representationis*, must be strictly proved.

"The right of representation takes place in the descent of copyholds; for whenever the custom gives any person the heirship, the law will give all necessary rights and incidents," *Cruise*, Dig. Tit. xxix. Descent (6); and "there is the same *jus representationis* in the case of inheritances descendible by custom as by the common law": *Scriven* on Copyholds (7).

In the present case the Plaintiff represents his father, the intestate's uncle.

[BACON, V.C. :—Who died without having been seised.]

Karslake, Q.C., in continuation :—

No doubt; he died in the lifetime of the intestate; but his youngest son is nevertheless entitled, as in *Godfrey* v. *Bullock* (8), where the custom was that if a man should die without issue male, his eldest daughter should take the land, and if he had no daughter, that the eldest sister should take; and it was held that though the eldest daughter of a tenant who died seised of the

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(1) 1 H. & M. 43. 9 Jur NS. 42
(2) 1 P. Wms. 63.
(3) Page 59.
(4) 1 K. & J. 644, 655.
(5) 1 My. & Cr. 423.
(6) Ed. of 1835, vol. iii. p. 190.
(7) Ed. of 1846, vol. i. p. 44.
(8) 1 Roll. Abr. 623.

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land was dead, her daughter was to be preferred to the living daughters of the deceased tenant.

The doctrine is laid down by Lord *Hatherley*, when Vice-Chancellor *Wood*, in general terms in *Hook* v. *Hook* (1). He says, referring to three conveyancers whose opinions were taken in *Gooding* v. *Gooding* (*Chitty* on Descent (2)), "They all agree that the issue of a deceased brother stand in his place for the purposes of heirship."

Millar, Q.C., and *Hull*, *Freeman* and *W. P. Beale*, for other parties.

Everitt, in reply:—

The distinction between the nature of the proof required, on the one hand, in the cases of borough English and gavelkind, and on the other, in the case of a special custom, is fully recognised by Mr. *Joshua Williams* in his work on Seisin (3), notwithstanding his remarks (4) on the decision in *Muggleton* v. *Barnett*. The point is further illustrated in *Robinson* on Gavelkind (5).

BACON, V.C.:—

The cases are no doubt very nice; and this case has been very elaborately and very ably argued on both sides—if I were to say by either side especially, I should say by Mr. *Karslake* and Mr. *Grosvenor Woods*; but it comes back to this. Here is a custom of a manor which is as much a part of the law of the realm as any other law, by whatever authority it is established. The Courts take notice of borough English and of gavelkind, and have several times recognised these particular customs. Nor has any one ever questioned that the customs of a manor are of equal authority with, and as equally binding as, the common law. Their antiquity is perhaps greater than that which can be ascribed to the common law. It was admitted by Chief Justice *Cockburn*, in *Muggleton* v. *Barnett* (6), that customs are a law of themselves, and I know of no mode of construing customs but the literal mode.

The custom of this manor is, that upon the death of a tenant, his youngest son, if there be one, shall take; if not, his youngest daughter, if there be a daughter; if not, his youngest brother or sister, uncle or aunt, if any such there be. But if there be none, there is an end of the custom. It is as if it had never existed, and the inheritance must descend according to the course of common law.

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(1) 1 H. & M. 49. 9 Jur NS 44
(2) Page 183.
(3) Page 93.
(4) Page 95.
(5) Page 118.
(6) 2 H. & N. 653, 681.

The cases that have been referred to, from which it has been endeavoured to draw the inference that there must be a *jus representationis*, are answered by the observation that they were decided by analogy to the custom of estates in borough English or gavelkind. But if the case before me is one neither of borough English nor of gavelkind, how can I depart from the simple signification of the words which say that in certain instances the land shall descend in a particular way, and there stop. If there be no person to answer literally the description contained in the words of the custom, the consequence must be that the common law declares to whom the estate shall descend.

There is no instance in this manor of the *jus representationis* having been ever successfully claimed. The matter mentioned in the concluding paragraph of the affidavit is simply this, that in one instance it was stated that a youngest nephew was the customary heir of a deceased tenant, but he was not admitted; and the reason why he was not admitted is given. There is no suggestion that if there had been no such reason, he would have been admitted; there is only the fact that he was not admitted.

The cases do not assist the Plaintiff's contention. I have listened with the utmost respect to the citations from *Muggleton* v. *Barnett* (1), and the other authorities, including *Clements* v. *Scudamore* (2), but they do not help me to decide this case in favour of the Plaintiff. None of the authorities shew that the Court is at liberty to depart from the literal sense of the words, or to supply other words in their place. That the *jus representationis* was not intended to exist in this instance, I am convinced from the terms of the statement of the custom, for if the *jus representationis* had existed, then the right of the youngest uncle's youngest son—the right, in fact, of the present claimant—would have prevailed over the right of a youngest aunt, had there been one. Is that the meaning of the custom? Is not the meaning of the custom this: that immediately upon the death of a tenant you are to ascertain whether he has a youngest son or daughter, brother or sister, uncle or aunt living, and if you can find any one of them, the land descends to that person; but, if not, there is an end of the custom? There is nothing said as to how the custom is to take effect except in these words, and, as I have said, I have no power to alter or add to the words.

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(1) 1 H. & N. 282; 2 Ibid. 653.

(2) 1 P. Wms. 63.

Upon these grounds, therefore, I think that the *jus representationis* is excluded, and that the customary lands descend as if the owner had died intestate of them at common law.

Solicitors: *Sowton*, agent for *Arnold & Cooper, Chichester; James Robinson; Rogerson & Ford; Blake & Heseltine.*

J. B. D.

GLOVER *v.* GILES.

[1879 G. 224.]

FRY, J.
1881
April 5.

Building Society—Certificate of Incorporation—Irregularity of Proceedings—Power of Court to declare Certificate void—Prerogative of Crown—Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *ss.* 7, 9, 12, 32.

The Court has no power to declare the certificate of incorporation of a building society, given by the Registrar under the provisions of the *Building Societies Act,* 1874, void on the ground that it has been obtained irregularly.

THIS action was brought by *John Glover* and thirteen other persons, on behalf of themselves and other members of the 90*th Starr Bowkett Benefit Building Society,* not fewer than one-fourth of the whole of the members, and holding not less than one-third of the whole number of shares, against *T. F. Giles, Joseph Gascoyne,* and *George Freemantle,* trustees of the society; *George Bensted, Jonathan Franklin, James Murphy, Joseph Holmes, John Morris,* and *James Steere,* directors of the society; *C. A. Brown,* the secretary and treasurer of the society; *J. W. Beecher* and *L. H. Winslow,* who, with *Giles, Gascoyne,* and one *J. W. Smith,* had been appointed trustees for the purpose of the dissolution of the society.

The society was formed in the year 1865, and was enrolled pursuant to the Act 6 & 7 Will. 4, c. 32, its rules being duly certified by the barrister appointed to certify the rules of savings banks. One of the rules (No. 28) provided that "A general meeting may at any time be convened by the board of management, or upon a requisition signed by not less than fifteen members, and fourteen days' public notice of such general meeting shall be given. A majority, consisting of not less than three-fourths of the members present at a general meeting, legally convened pursuant to 10 Geo. 4, c. 56, s. 9, shall alone have the power to enact any new law; to rescind or amend any established law."

In the year 1879 the society had lost a considerable sum of money through defalcations of the Defendant *Brown.* On the

10th of April, 1879, a general meeting of the members was held, in pursuance of a request by members, to consider resolutions for the incorporation of the society under the *Building Societies Act* of 1874 (37 & 38 Vict. c. 42); for the appointment of a committee to arrange an amalgamation (with a view to liquidation) with the 106*th Starr Bowkett Benefit Building Society*, and for the liquidation of the society (as soon as incorporated) under the regulations of the Act of 1874; and for the appointment of liquidators. At this meeting it was stated that the 106*th Starr Bowkett Society* had declined to amalgamate with the society. Resolutions were passed to the effect that the society be incorporated under the Act of 1874, and that, as soon as the society should be incorporated, it should be liquidated under the regulations of that Act, and that *Giles*, *Gascoyne*, *Beecher*, *Smith*, and *Winslow*, be appointed liquidators for the purpose of carrying out the same. After this a certificate of incorporation of the society, under the Act of 1874, was obtained from the Registrar of Building Societies, the certificate being dated the 26th of April, 1879. An instrument of dissolution of the society, in accordance with sect. 32 of the Act of 1874, was then prepared. It was dated the 15th of May, 1879, and was signed by not less than three-fourths of the members of the society, holding not less than two-thirds of the whole number of shares in the society. This document contained a statement of the liabilities and assets of the society. By it *Giles*, *Gascoyne*, *Beecher*, *Smith*, and *Winslow* were appointed trustees for the special purpose of the dissolution, and the trustees were thereby authorized to "settle the claim of the society against the estate of *C. A. Brown* upon such terms as shall be mutually agreed upon between the parties, and to give an effectual discharge for the same." The trustees were also authorized "to do all acts, not only incidental to the carrying out of the dissolution, but also any which may appear to them necessary to carry out or rectify any omission of any act which should have been done previous to the dissolution." The instrument of dissolution was registered under the Act of 1874, the Registrar's certificate of registration being dated the 28th of May, 1879.

The Plaintiffs alleged that the meeting of the 10th of April was not duly convened, no public notice of it having been given, and many of the members having received no notice of it. The Plaintiffs also alleged that the resolutions which were passed at the meeting were passed on the faith of an undertaking by the Defendant *Giles*, who was the chairman, that a complete statement of the affairs of the society should be prepared and sent to all the members before the resolutions were acted on, and that the Defendants were preparing to act on the resolutions and on the instrument of dissolution, without this having been done.

The Plaintiffs also alleged that many of the members who signed the instrument of dissolution were induced to do so by means of misrepresentations of material facts, knowingly made by the Defendants *Giles, Gascoyne,* and *Brown,* for their own purposes. In particular, the Plaintiffs alleged that the Defendants *Giles, Gascoyne,* and *Brown* wilfully suppressed the fact that *Brown* had fraudulently appropriated to his own use moneys and securities of the society to the amount of £5000, and that *Giles* and *Gascoyne* were creditors on a separate account of *Brown,* and also trustees of a composition deed between him and his creditors, and that the duty and also the interest of *Giles* and *Gascoyne* in those capacities were adverse to the interests of the society, they being mainly to save the property of *Brown* for their own benefit from the operation of sect. 12 of the Act 4 & 5 Will. 4, c. 40 (whereby the society would, but for the instrument of dissolution, have a first claim on the property of *Brown*), and to devote such property to the payment of his general creditors.

The Plaintiffs also alleged that the statement of the liabilities and assets of the society contained in the instrument of dissolution was not a sufficient one in compliance with sect. 32 of the Act of 1874.

The Plaintiffs claimed a declaration that the certificate of incorporation of the 26th of April, 1879, was obtained by fraud, and was of no effect and ought to be delivered up to be cancelled; that the resolutions which purported to have been passed at the meeting of the 10th of April, 1879, and to authorize the obtaining of the certificate, were obtained through the misrepresentations of the Defendants *Giles, Gascoyne,* and *Brown,* and were invalid, and not binding on the Plaintiffs or on the society; that the instrument of dissolution was similarly obtained and was fraudulent and void as against the Plaintiffs and the society, and ought to be set aside and delivered up to be cancelled; and that, notwithstanding the certificate of incorporation and the instrument of dissolution, the society was a subsisting society under the provisions of the Act 4 & 5 Will. 4, c. 40, and entitled to the benefit of the provisions therein contained. The Plaintiffs also claimed an injunction to restrain the Defendants from carrying into effect any of the provisions contained in the instrument of dissolution; that a receiver of the assets of the society might be appointed; and damages.

The society in its corporate capacity was not made a Defendant to the action.

The Plaintiffs went into evidence of the circumstances attending the execution of the deed.

Cookson, Q.C., and *Russell Roberts*, for the Plaintiffs:—

The object of setting aside the certificate of incorporation under the Act of 1874, and the deed or instrument of dissolution, is the better enforcing of the claim of the society against the estate of *Brown*. Under sect. 12 of the Act 4 & 5 Will. 4, c. 40, this claim is entitled to priority over his other debts: *Moors* v. *Marriott* (1). If the deed of dissolution stands, the trustees can settle with *Brown* on any terms they please, and we believe that they intend to give him very favourable terms. The certificate of incorporation and the deed ought to be declared void, because the so-called meeting of the 10th of April was not duly convened according to the rules of the society and the provisions of the Act 10 Geo. 4, c. 56, s. 9. Moreover, the signatures to the deed, or many of them, were obtained by means of misrepresentation or suppression of material facts. No proper statement of the assets and liabilities of the society was laid before the meeting of the 10th of April, 1879. Also, the statement of liabilities and assets contained in the deed is, on the face of it, not a sufficient compliance with sect. 32 of the Act of 1874 (2).

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(1) 7 Ch. D. 543.

(2) Sect. 7 of the Act of 1874 (37 & 38 Vict. c. 42) provides that "The Act of 6 & 7 Will. 4, c. 32, intituled 'An Act for the regulation of Benefit Building Societies,' is hereby repealed, but this repeal shall not affect any subsisting society certified under the said

[*North*, Q.C., for the Defendants:—The misrepresentations alleged are to individual members of the society; the individuals to whom they were made are alone entitled to sue in respect of them.]

Probably that is so.

When a majority of shareholders in a company are acting illegally or irregularly, the minority can maintain an action to restrain them from so doing: *Atwool* v. *Merryweather* (1); *Clinch* v. *Financial Corporation* (2); *Menier* v. *Hooper's Telegraph Works* (3); *Russell* v. *Wakefield Waterworks Company* (4).

A single dissentient shareholder can maintain such an action. The proceedings are altogether *ultrà vires*. The society has never lost its *status* under the Act 6 & 7 Will. 4, c. 32, under which it was registered, and has never become a society to which the Act of 1874 applies. It could not, therefore, be dissolved under sect. 32 of that Act. But for the provisions of sect. 32 of the Act of 1874, a building society could only be wound up as an unregistered company under part 8 of the *Companies Act*, 1862. The certificate of incorporation was granted only by virtue of the resolutions of the irregular meeting of the 10th of April, 1879.

[Fry, J.:—Have I any power to set aside the Registrar's certificate?]

Act until such society shall have obtained a certificate of incorporation under this Act."

Sect. 9. "Every society now subsisting or hereafter established shall, upon receiving a certificate of incorporation under this Act, become a body corporate by its registered name, having perpetual succession, until terminated or dissolved in manner herein provided, and a common seal."

Sect. 12. "A certificate of incorporation under this Act shall not be granted to an existing society except upon application to the Registrar made by authority of a general meeting of the society specially called for the purpose, and the Registrar may require of the person making the application a statutory declaration that such authority was duly given."

Sect. 32 provides that "A society under this Act may terminate or be dissolved" (*inter alia*) "by dissolution with the consent of three-fourths of the members, holding not less than two-thirds of the number of shares in the society, testified by their signatures to the instrument of dissolution. The instrument of dissolution shall set forth (*inter alia*) the liabilities and assets of the society in detail."

(1) Law Rep. 5 Eq. 464, n.

(2) Law Rep. 5 Eq. 450; Ibid. 4 Ch. 117.

(3) Ibid. 9 Ch. 350.

(4) Ibid. 20 Eq. 474.

Yes. *Laing* v. *Reed* (1) shews that the certificate of the barrister appointed to certify rules under the Building Societies Acts is not conclusive as to the legality of a rule. The Act of 1874 contains no provision that the Registrar's certificate of incorporation shall be even *primâ facie* conclusive.

[FRY, J.:—My difficulty is, that sect. 9 says that the society shall, upon receiving a certificate of incorporation, become a body corporate. It would be a very strange thing if this Court has power to disincorporate a corporate body.]

The Court can declare that the certificate is void because it has been improperly obtained. The verdict of the Court would at any rate assist the Crown in quashing the incorporation.

[FRY, J.:—Is there any authority for saying that the Court can declare that, which the Crown has said is a body corporate, to be unincorporated? No doubt proceedings may be taken by the Crown to recall a charter of incorporation, on the ground that it has been obtained by means of a fraud on the Crown, but can any one except the Crown avail himself of such a fraud?]

Suppose there had never been any meeting of the society at all, but the certificate of incorporation had been obtained by means of a false statutory declaration. The Court could, at any rate, restrain the persons who had obtained a certificate in such a way from acting upon it. The deed of dissolution can have legal effect only if the society is incorporated under the Act of 1874. If the Court is unable to disincorporate the society, still it can prevent a fraud upon the members from being carried into effect. It may not be able to stop the mischief at its fountain-head, but it will stop it from spreading any further. The resolutions of the meeting clearly amounted to a change of the fundamental constitution of the society, they rescinded the established laws of the society; therefore the provisions of rule 28, and of 10 Geo. 4, c. 56, s. 9, should have been complied with, and they were not. The proceedings of the meeting are consequently invalid: *MacDougall* v. *Gardiner* (2); *In re British Sugar Refining Company* (3); *The King* v. *Langhorn* (4).

(1) Law Rep. 5 Ch. 4.

(2) 1 Ch. D. 13.

(3) 3 K. & J. 408.

(4) 4 A. & E. 538.

[FRY, J.:—Can the deed be set aside because some of the persons who signed it were induced to do so by an untrue representation that the previous proceedings had been regular, the other persons who signed it knowing all the facts? You admit you cannot raise the question of misrepresentations to individual members in the present action.]

But we are entitled to use the fraud as an answer to the objection that the persons who signed the deed are estopped by their so doing. The persons who signed the deed with a knowledge of the facts cannot avail themselves of it as against those who were induced to sign it by misrepresentations.

North, Q.C., and *Oswald*, for the Defendants, were not heard.

FRY, J.:—

This is unfortunately one of that numerous class of cases which result from the defalcations and sometimes from the frauds of officers of benefit building societies. [His Lordship then stated the facts, the nature of the relief claimed by the Plaintiffs, and the provisions of the Act of 1874, and proceeded:—] The certificate of incorporation was given to the society by the properly appointed officer, and I am now asked to declare that certificate void.

In opening the Plaintiffs' case, it was in the first instance put upon two grounds—first, misrepresentation of particular facts alleged to have been made to particular members of the society; and secondly, upon irregularity in general. Mr. *Cookson*, however, very fairly, and I think necessarily, admitted that he could not, in this action, as the record is framed, succeed upon the ground of misrepresentations to particular members of the society. Therefore, the question which I have to determine is whether the incorporation can be declared void on the ground of irregularity.

It appears to me clear that before the certificate was granted by the Registrar it was his duty to satisfy himself whether the application was made by authority of a general meeting of the society specially called for the purpose, and he was at liberty to require the person making the application to verify that authority by a statutory declaration, and, upon this being done, and the certificate being granted according to the terms of the Act, the society became incorporated.

Now, it is said, I can declare that incorporation to be void, on the ground that no proper meeting was held, and it is said that the meeting which was held on the 10th of April, 1879, was not a proper meeting within the meaning of the 12th section of the Act, because it was not summoned in compliance with certain rules of the society with regard to the summoning of general meetings. In my view, I have no power to inquire into that at all, and I cannot declare the incorporation to be void. The incorporation of persons into bodies corporate is a prerogative of the Crown, and, although in this case the prerogative is exercised under certain statutory provisions, the incorporation is none the less an exercise of the prerogative. There is a perfectly well-known method by which an incorporation may be recalled or made void. Moreover, it is competent to proceed by *quo warranto*, and to shew that persons who represent themselves as members or officers of a corporation are not so. But it is quite new to me to hear that some of the individual corporators of a corporation can come to this Court and ask to have it declared, as against other members of the corporation, that the incorporation was obtained by fraud or irregularity. And there is in this case, as it appears to me, this further fatal objection, that the declaration that the incorporation is void is sought for in the absence of the corporation itself, which is not made a Defendant to this action. I am in effect asked to declare an incorporation void in the absence of the corporation itself, a step which in common fairness it is impossible for me to take.

The next question arises on the 32nd section of the Act. [His Lordship read it.] It has been said by Mr. *Roberts* that the specification of the liabilities and assets which appears in the instrument of dissolution in the present case is on the face of it not sufficiently in detail. I can only say that I think Mr. *Cookson's* admission that it was correct in form was much better than Mr. *Roberts's* argument.

There remains the question which has been raised upon the evidence, whether the liabilities and assets in detail did appear upon the instrument of dissolution at the time when it was signed.

One of the liquidators says that the figures were not there when he signed it the first time, but that they were there when he signed it the second time. Therefore, it appears to me that he gave his consent to the instrument as it now stands. No other evidence worthy of a moment's attention has been adduced to shew that the instrument was not in proper form at the time when it received the several signatures to it. It is suggested that signatures were obtained by misrepresentations. I have already said that Mr. *Cookson* has admitted that on misrepresentations to individuals he cannot succeed in this action. But it seems to me clear that the dissolution was with the consent of three-fourths of the members, and that this is testified by their signatures to the instrument of dissolution. That is really all which I have to inquire into. And the evidence which has been given tends to shew that there was no concealment of Mr. *Brown's* defalcations, and that the persons who were asked to sign the instrument of dissolution were told in effect that it was to wind up the company; that was shortly the nature and effect of it. Further than that, one or two of the witnesses said that Mr. *Brown* began to read it over to them, and that they stopped him.

It appears to me, therefore, that the Defendants have shewn a dissolution of the society with the consent of three-fourths of the members, testified in the manner required by the Act, and therefore the ground on which I am asked to say that the instrument of dissolution is void entirely fails. That is the whole of the case, and the result is that I must dismiss the action with costs.

Solicitors for Plaintiffs: *Brook & Chapman.*
Solicitors for Defendants: *Woodbridge & Sons.*

W. L. C.

FRY, J.
1881
May 14, 16.

WALTERS *v.* WALTERS.

[1865 W. 235.]

Executor—Retainer—Equitable Assets—Real Estate—3 & 4 Will. 4, c. 104.

22 ChD 646

Real estate is by the statute 3 & 4 Will. 4, c. 104, made assets for the payment of debts only in equity, and an executor has no right of retainer against it.

Personal estate being the primary fund for the payment of specialty debts, the circumstance that the specialty debts of a testator, whose personal estate is insufficient to pay those debts in full, have been actually paid in the first instance partly out of the proceeds of the sale of real estate, will not give the executor a right to retain his own simple contract debt out of personal estate subsequently realized, which he would not have had if the whole personal estate had been applied in the first instance in payment of the specialty debts.

THIS suit was commenced by bill filed in the Court of Chancery on the 17th of November, 1865, for the execution of the trusts of the will of *Ralph Walters* and the administration of his real and personal estate.

By his will, dated the 21st of September, 1861, the testator devised and bequeathed all his real and personal estate unto and to the use of his brothers *George Walters* and *Robert Walters*, their heirs, executors, administrators, and assigns, according to the respective natures and tenures thereof, upon trust to pay to his wife *Elizabeth Walters* an annuity of £800 for her life, if she should continue his widow, and upon trust to pay certain other annuities and legacies, and subject thereto upon trust for all or such one or more of his daughters Mrs. *Jones*, Mrs. *Hamilton*, and Mrs. *Stone* as should survive him. And he appointed his wife and his said two brothers executors of his will. The will contained no charge of the testator's debts on his real estate.

The testator died in April, 1865. The will was proved by the widow alone, power being reserved to *George Walters* to come in and prove. *Robert Walters* renounced probate and disclaimed the trusts of the will.

The bill was filed by *George Walters*, the Defendants being the widow and the three daughters and their husbands.

On the 27th of July, 1866, an administration decree was made. *George Walters* died on the 5th of April, 1867. He had appointed *Catherine Walters* his sole executrix, and she proved his will. On the 2nd of May, 1867, upon her application, an order was made to revive the suit of *Walters* v. *Walters*. A suit of *Stone* v. *Walters* was afterwards instituted to administer the estate of *George Walters*, by Mr. and Mrs. *Stone* against *Catherine Walters*. *Elizabeth Walters*, the widow of *Ralph Walters*, died after the 8th of August, 1876.

On the 8th of August, 1876, an order was made in the suit of *Walters* v. *Walters* directing that the sum of £17,407 3*s.* Consols then in Court to the credit of the cause, "Policy moneys account," should be sold, and that the money arising from the sale should be carried over to the general credit of the cause, and it was ordered that so much of the sum of £39,972 16*s.* Consols then in Court to the credit of the cause, "the proceeds of the sale of the testator's real estate," as with the money to arise by the sale of the £17,407 3*s.* Consols would raise £51,660 1*s.* 3*d.* (being the amount of the specialty debts of the testator *Ralph Walters*) should be sold, that the money to arise by such sale should be carried over to the general credit of the cause, and that out of the moneys so carried over the specialty debts should be paid. The sales were effected in pursuance of this order and the specialty debts were paid. The total amount of the personal estate of the testator *Ralph Walters* realized up to November, 1880, was £43,688 13*s.* 11*d.*; his simple contract debts amounted to £66,082 14*s.* 11*d.* On the 9th of March, 1881, the Chief Clerk made a general certificate, which was approved by the Judge on the 25th of March, by which (*inter alia*) he found of what the estate of the testator outstanding or undisposed of consisted. It consisted mainly of two sums of £20,357 11*s.* 10*d.* Consols and £459 7*s.* 2*d.* New Three per Cents then in Court. He found also that the whole of the testator's real estate had been sold since his death or conveyed to mortgagees in satisfaction of their mortgages, and that the purchase-money had been applied in payment of the taxed costs of the suit, and in payment of the specialty creditors, and that the residue thereof formed part of the fund then in Court.

The suit now came on for further consideration.

Catherine Walters, as executrix of *George Walters*, claimed to be paid out of the funds in Court, which arose in part from the proceeds of the sale of real estate of the testator and in part from the realization of personal estate, which had been realized since the date of the order of the 8th of August, 1876, in priority to the other simple contract creditors, a simple contract debt of £490, which was due by the testator *Ralph Walters* to *George Walters*. With her consent a summons was taken out by the Plaintiffs in the suit of *Stone* v. *Walters*, asking that the amount of the debt due to *George Walters*, with interest and costs, might be carried over to the credit of that suit. This summons came on for hearing with the further consideration of *Walters* v. *Walters*.

J. Pearson, Q.C., and *W. Barber*, for the Plaintiffs in *Walters* v. *Walters*.

North, Q.C., and *Chapman Barber*, for the summons:—

The right of retainer extends to an executor of an executor: *Thomson* v. *Grant* (1).

[FRY, J.:—In that case the right of retainer was allowed to the executor of the only executor who had proved the will of the original testator, and who therefore represented the original testator.]

The administration decree and the payment of the assets into Court do not affect the executor's right of retainer: *Richmond* v. *White* (2); *Langton* v. *Higgs* (3); *Nunn* v. *Barlow* (4). One of two executors can retain his own debt out of a balance due from both to the testator's estate: *Kent* v. *Pickering* (5).

Glasse, Q.C., and *Oswald*, for the Defendants Mr. and Mrs. *Hamilton*, in support of the summons:—

An executor who is plaintiff in an administration suit, on behalf of himself and all the other creditors of the testator, and who has submitted to account in the ordinary way, does not lose his right of retainer: *Ex parte Campbell* (6). And in *Morris* v. *Morris* (7)

(1) 1 Russ. 540, n.
(2) 12 Ch. D. 361.
(3) 5 Sim. 228.
(4) 1 S. & S. 588.
(5) 2 Keen, 1.
(6) 16 Ch. D. 198.
(7) Law Rep. 10 Ch. 68.

the right was allowed in the case of an unascertained partnership liability. A devisee can also retain a debt due to him out of the produce of the estate devised to him: *Loomes* v. *Stotherd* (1). The executrix of *George Walters* is bound to assert the right: *Fox* v. *Garrett* (2).

Cookson, Q.C., *T. Stevens*, and *H. Fellows*, for the executor of the surviving executor of the original testator:—

The statute 3 & 4 Will. 4, c. 104, makes real estate assets in a Court of Equity for the payment of debts, and it must be administered on equitable principles: *Hamer's Devisees' Case* (3); *Kinderley* v. *Jervis* (4); *Cummins* v. *Cummins* (5). There never was any right of retainer out of equitable assets: *Williams* on Executors (6); *Hopton* v. *Dryden* (7). The specialty debts ought to have been primarily paid out of the legal assets, and the equitable assets ought now to be recouped out of the legal assets which have since been realized: *Baily* v. *Ploughman* (8). If that is done there will be no legal assets left, and no fund, therefore, against which there can be a right of retainer. The executor could not retain his own simple contract debt in priority to specialty creditors: *Talbot* v. *Frere* (9). Moreover, the proceeds of sale of real estate would never pass through the executor's hands. *Hopton* v. *Dryden* shews also that the executor of an executor has no right of retainer unless he represents the original testator, which he does not if his own testator was not the survivor of several executors. It must be shewn that an executor has exercised his right of retainer in his lifetime: *Burge* v. *Brutton* (10). The tendency of the Courts now is to restrict the right of retainer: *Bain* v. *Sadler* (11); it is a right which is always exercised when there is a deficient estate, and the exercise of it leads to injustice.

North, in reply:—

We only ask the Court to leave matters as they now stand.

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(1) 1 S. & S. 458.
(2) 28 Beav. 16. 6 Jur NS 207
(3) 2 D. M. & G. 366.
(4) 22 Beav. 1. 2 Jur NS 662
(5) 3 J. & Lat. 64.
(6) 8th Ed. vol. ii. p. 1045.
(7) 2 Eq. Cas. Abr. 450.
(8) Mosely, 95.
(9) 9 Ch. D. 568.
(10) 2 Hare, 373.
(11) Law Rep. 12 Eq. 570.

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The Act of 3 & 4 Will. 4 gives no priority to specialty debts for which the heirs are not bound over simple contract debts. The Court has directed assets which are clearly liable to pay the specialty creditors to be applied in paying them. We are not asking to retain our debt out of the proceeds of real estate. In *Burge* v. *Brutton* (1) there had been no action or suit during the life of the executor. But a decree for administration does not put an end to the right; the question has always arisen on further consideration. No one can sue after the decree, and therefore the death of the executor after decree makes no difference. But it will be presumed that an executor would retain his own debt: *Weeks* v. *Gore* (2).

FRY, J., after stating the facts, continued:—

It is plain that the testator's personal estate was inadequate for the payment of his specialty debts, and it is equally plain that those debts were in fact paid out of two funds, one of which consisted of the proceeds of personal estate, and was legal assets, and the other consisted of the proceeds of the sale of real estate which were made assets for the payment of debts by the statute 3 & 4 Will. 4, c. 104. The question now is as to the right of *Catherine Walters*, as executrix of the testator's executor *George Walters*, to retain a simple contract debt due to the executor out of the fund now in Court, which consists partly of legal assets applicable for the payment of the testator's debts. It is perfectly plain that a right of retainer exists in the case of legal assets, but it is a right *inter pares*—a right as against creditors in an equal degree—and it extends no further, and if the personalty had been in fact applied in the payment of the specialty debts the executor could never have succeeded in asserting the right. If the right can be asserted now it must depend upon the order in which the different funds have been applied in the payment of the specialty debts. I think that a right of retainer can never exist with regard to the real estate which is made assets by the statute of Will. 4, and this for several reasons. In the first place, the statute makes real estate assets "to be administered in Courts of Equity," and equality being equity, an executor has in equity no right of retainer. In

(1) 2 Hare, 373.

(2) 3 P. Wms. 184, n.

the next place, the right of retainer applies *ex necessitate* only to assets which come into the hands of the executor, and the real estate never does come into his hands. In the third place, the right arises out of the legal incapacity of the executor to sue himself for a debt due to him from the testator, but if he were not an executor, he never could sue the executor at law in respect of assets under the statute.

The question, therefore, is, whether the right of retainer exists by reason of that part of the fund now in Court which is legal assets having come into Court in the suit after the payment of the specialty debts. Suppose the executor had been an outsider, and had sued for this debt now, would the Court have given him the priority which he claims? In my judgment it would not, but it would have administered the assets according to the rights of the parties, irrespectively of the mere accident of the order in which the funds had been applied to payment of the specialty debts. The Court would have marshalled the assets in order to give effect to the rights of all parties. Moreover, it is the representative of the executor who is asserting the right, and if there is any one who is bound by the rule that legal assets are the primary fund for the payment of all debts, it is the executor. I will refer to the following passage in *Williams* on Executors (1): "It is, however, a well known rule that, as between the real and personal representatives of all persons deceased, the personal estate in the hands of the executor or administrator is the primary and natural fund which must be resorted to in the first instance for the payment of debts of every description contracted by the testator or intestate. But it is clear that this principle can only regulate the equitable administration of assets, and does not extend to the legal control of the creditor of the deceased; for it is discretionary with him, if his debt is of a nature to bind both the real and personal estate, whether he will resort to the personal estate in the hands of the executor, or to the real estate descended or devised. Hence, if the obligee of a bond bring an action of debt against the heir, he cannot plead that there is an executor who has assets." It appears to me that the order of the 8th of August, 1876, must have proceeded upon the right of the specialty creditors to be paid out of

(1) 8th Ed. vol. ii. p. 1699.

any assets which were available, and that it was never intended to enlarge the executor's right of retainer. The specialty debts in fact exhausted the legal assets, and, as the executor has no right of retainer against equitable assets, there is no fund now existing against which that right can be exercised. I must therefore dismiss the summons.

Solicitors: *Currie, Williams, & Williams*; *Geare & Son*; *Webb, Stock, & Burt*; *Stibbard, Gibson, & Co.*

W. L. C.

FRY, J.
1881
May 18, 19.

BAINBRIGGE *v.* BROWNE.

[1880 B. 2360.]

Undue Influence—Father and Child—Deed executed by Child in favour of Father—Onus Probandi—Purchaser for Value without Notice.

When a deed conferring a benefit on a father is executed by a child who is not emancipated from the father's control, if the deed is subsequently impeached by the child, the *onus* is on the father to shew that the child had independent advice, and that he executed the deed with full knowledge of its contents, and with a free intention of giving the father the benefit conferred by it. If this *onus* be not discharged the deed will be set aside.

This *onus* extends to a volunteer claiming through the father, and to any person taking with notice of the circumstances which raise the equity, but not further.

If a solicitor purports to act in the transaction on behalf of the child, a purchaser for value is entitled to assume that he has given the child proper advice, even though he be also acting as the father's solicitor.

There is no absolute rule that in such a transaction the father and the child must be advised by different solicitors.

THIS action was brought by Miss *E. M. Bainbrigge* and her brothers, *W. P. Y. Bainbrigge* and *J. H. Bainbrigge*, claiming a declaration that a deed, dated the 30th of June, 1877, by which they had charged their reversionary interests in the funds comprised in the marriage settlement of their father and mother with the payment of certain mortgage debts due by their father, the Defendant, *W. H. Bainbrigge*, to the Defendants *G. H. Browne*, *Edward Rogers*, and *Joseph Rock*, had been improperly obtained from them, and was void as against them, and to have the same set aside. The writ was issued on the 26th of July, 1880.

The father and mother of the Plaintiffs were married in the year 1851. By the settlement, dated the 4th of June, 1851, executed previously to their marriage, a sum of £5000 was vested in trustees, upon trust to pay the income to the wife during her life, for her separate use without power of anticipation, and after her death to pay the same to the husband during his life, and subject thereto the trustees were to stand possessed of the trust funds on trust for the children of the marriage in such shares as the wife should by deed or will appoint. The Plaintiffs were the only issue of the marriage, and by a deed dated the 10th of November, 1876, the mother irrevocably appointed the trust funds (subject to the life estates) to the Plaintiffs in equal shares, as tenants in common. At the time when the deed of the 30th of June, 1877, was executed, the daughter was about twenty-five, the eldest son was about twenty-four, and the second son about twenty-two. The daughter was then usually resident in her father's house at *Droitwich*, but when she executed the deed she was on a temporary visit to an aunt at *Lowestoft*. The deed was sent to her by her father, with a letter requesting her to sign it. This letter was not produced at the trial, and it appeared to have been lost or destroyed. The aunt attested the daughter's execution of the deed. The elder son was then studying medicine at the University of *Edinburgh;* the younger son was an undergraduate at *Oxford*. When they executed the deed they were both at home for a vacation, and they executed it in the presence of their father and mother, and of a clerk of Mr. *E. H. Collis*, their father's solicitor, who had prepared or approved the deed, the clerk attesting their execution.

The deed was made between the father of the first part, the mother and the three Plaintiffs of the second part (the Plaintiffs being described only as the children of *W. H. Bainbrigge* and his wife), the Defendant *Browne* of the third part, and the Defendants *Rogers* and *Rock* (who were partners in trade) of the fourth part. It contained recitals of the marriage settlement (its date being given), of the fact that there had been only three children of the marriage, and that they had all attained twenty-one, and were unmarried, and of the deed of appointment of the 10th of November, 1876. There was then a recital of a deed dated the 23rd of February, 1875, whereby the father had assured certain hereditaments at *Droitwich* to the Defendant *Browne* to secure the payment of £11,044 9*s.* 6*d.* together with divers other sums of money, with interest thereon respectively at £8 per cent. per annum, and a recital of a deed of further charge, dated the 29th of August, 1876, whereby the father assured the same hereditaments to the Defendants *Rogers* and *Rock* (subject to the charge in favour of the Defendant *Browne*) to secure £400, and other moneys thereafter to be advanced by *Rogers* and *Rock* to the father, with interest thereon respectively at £6 per cent. per annum. There was then a recital that the interest was greatly in arrear on both mortgages, and that there was due for principal and interest on the first mortgage £18,726 19*s.* 5*d.*, and on the second £2505 18*s.* 2*d.*, and that the mortgagees had respectively forborne to press for payment of the arrears of interest or to exercise their powers as mortgagees in consideration of the execution of this deed, and that it had been agreed between the parties that £18,726 19*s.* 5*d.* should be considered to be the principal sum due on the first mortgage, and £2505 18*s.* 2*d.* the principal sum due on the second mortgage. There was then a recital that the mother and the three children had agreed to assign their interests under the settlement and the deed of appointment in order to secure the due payment of the interest to become due to the mortgagees respectively, and in consideration thereof the mortgagees respectively had agreed to reduce the interest payable under the mortgages as thereinafter mentioned. The deed then contained an assignment of the interests of the wife and children to the mortgagees accordingly. And the father and mother and the children respectively covenanted with the mortgagees for payment of the interest on the mortgage debts respectively, at the rates reserved by the mortgage deeds respectively, and, in case of default in payment of any interest for three months after it should have become due, power was given to the mortgagees to sell the premises thereby assured to them for the purpose of paying the interest. And there was a proviso that if the interest on the mortgage debts respectively should be paid by the father within thirty days after it became due, the rate of interest should for that time be reduced to £5 per cent. per annum.

The Plaintiffs, by their statement of claim, alleged that the deed was prepared by Mr. *Collis* on the instructions of their father; that neither of them gave any instructions for it, or in any way authorized its preparation; that the deed was not, previously to its execution, read over or the effect of it explained to any of them; and that they severally had no independent advice or assistance with respect to the deed prior to their severally executing it. They alleged that, prior to the execution of the deed, they had been urged by their father to assent to the laying out of the trust funds, which were invested in some *London and Brighton Railway* stock, in the purchase of a piece of land at *Droitwich;* that they were told by him that their consent to the change of investment was necessary; and that they ultimately, though reluctantly, consented to the change being made. They alleged that they executed the deed of the 30th of June, 1877, in the belief that they were thereby giving effect to the proposed change of investment, to which they had already assented, and that they would not have executed it had they known that it was an assignment by way of mortgage of their reversionary interests in the trust funds.

The Defendants *Browne, Rogers,* and *Rock,* by their statement of defence, said that the change of investment of the trust funds took place before November, 1876, and that, on the 11th of November, 1876, each of the Plaintiffs executed a deed of that date, whereby they respectively indemnified the surviving trustee of the marriage settlement against any loss which might result by reason of the new investment of the trust moneys. The Defendants alleged that Mr. *Collis* approved the deed of the 30th of June, 1877, on behalf of the Plaintiffs, after a long correspondence with the solicitor of the Defendants, throughout which he represented himself to be acting for the Plaintiffs. And the Defendants said that, if the execution of the deed was improperly obtained from the Plaintiffs, this was unknown to the Defendants or any of them, and that the Defendants acted throughout in good faith and gave valuable consideration for the collateral security contained in the deed, and the Plaintiffs derived benefit from the arrangement so made.

Each of the Plaintiffs gave evidence at the trial. They all said that they executed the deed of the 30th of June, 1877, in ignorance of its contents, and at the request of their father, and that they never gave any instructions for its preparation. The daughter said that her father told her that the deed was for the purpose of effecting the change of investment of the trust funds.

Some correspondence was also put in evidence, and the following passages were referred to :—

Letter from the father to the Defendants *Rogers* and *Rock*, 2nd of March, 1877.

"I have considered the proposition you made through Mr. *Collis* as to the reduction of the interest, and I shall be able to satisfy you that the interest as it accrues due will be readily and punctually paid after the 24th of June. . . . I shall be glad to see you whenever you like to appoint, with a view to carry into effect the proposition contained in your letter to Mr. *Collis*."

Letter from *Collis* to Defendants *Rogers* and *Rock*, 5th March, 1877.

"I have been considering a plan by which the *Bainbrigge* family might be induced to give yourselves and Mr. *Browne* further security, and to place matters between yourselves, Mr. *Browne*, and Mr. *Bainbrigge* upon a firmer footing and save much of the endless question of interest, &c.; but I do not feel much encouragement after this affair" (alluding to another matter of business) "to give myself trouble in a very delicate business and receive no thanks."

Letter from the father to Defendants *Rogers* and *Rock*, 26th of March, 1877.

"We shall have a meeting of family and friends about Easter, when we hope to be in a position to make a definite proposition, which we trust and anticipate will place matters upon a satisfactory basis for all parties."

Letter from the father to the Defendants *Browne*, *Rogers*, and *Rock*, 30th of April, 1877.

"Let me propose at once that Mr. *Rock* draws out a simple agreement properly, and legal for all parties to sign—that is, by

Mr. *Browne* and yourselves, myself, wife, and children, who each and all act for themselves."

Letter from the father to Defendants *Rogers* and *Rock*, 15th of May, 1877.

"I have now much pleasure in forwarding you the deed required for the completion of our present arrangement. I find the whole trust property is contained in the deed, and that you will therefore be enabled to get your lawyer to draw out the new deed in strict accordance with our memorandum of the 18th of April last. . . . I inclose Mr. *Collis's* letter sent with the deed."

This letter also stated the names of the wife and children.

Letter from the father to the Defendants *Rogers* and *Rock*, 17th of May, 1877.

"The document sent you is a mortgage transferred from the bank to Dr. *Fletcher* for the sum therein named, Dr. *Fletcher* being the trustee of my wife and children, who are solely entitled to the proceeds of this mortgage. Now my wife and children are willing to postpone the payment of the interest on the capital sum secured by this mortgage, until the future interest in accordance with our memorandum made between us be duly satisfied. And Dr. *Fletcher* will, with their consent and approbation, be a party to the proposed document to be prepared on behalf of Mr. *Browne* and yourselves. And, if you will let us have the draft of the document, I will obtain the necessary assents, and return the same to you for engrossment."

In other letters from *Collis* to the solicitors of the mortgagees he spoke of his "clients."

The mortgagees adduced no evidence. The father did not deliver any statement of defence, and did not appear at the trial.

Glasse, Q.C., and *Freeman*, for the Plaintiffs:—

The principles upon which the Court acts in dealing with such transactions are shewn by *Berdoe* v. *Dawson* (1), and *Kempson* v. *Ashbee* (2). The fact that the Defendants had notice of the rela-

(1) 34 Beav. 603.

(2) Law Rep. 10 Ch. 15.

tion of parent and child is sufficient to cast upon them the *onus* of proving that the transaction was a fair one: *Sercombe* v. *Sanders* (1); *Rhodes* v. *Bate* (2).

North, Q.C., and *Rigby,* Q.C., for the Defendants, the mortgagees:—

When we found that a competent solicitor was affecting to act for all the parties, the children as well as the father, and that they accepted his acts by executing the deed, we were entitled to assume that he gave the children proper advice, and we were not bound to question him whether he was really instructed by the children, and whether he had advised them properly. The presumption that the father has exercised undue influence arises only when it is shewn that the child is defenceless against the father, the father combining with the person who is to be benefited by the deed to injure the child: *Maitland* v. *Irving* (3). The presumption that the solicitor did his duty must be set against the presumption of undue influence on the part of the father, and it is sufficient as against a purchaser for value without notice to countervail it. *Sercombe* v. *Sanders* was a much stronger case than the present; the plaintiff had no professional advice. In that case and in *Berdoe* v. *Dawson* (4) the plaintiff came into direct contact with the person who was to have the benefit of the money. In *Kempson* v. *Ashbee* (5) the circumstances were very similar.

[FRY, J., referred to *Archer* v. *Hudson* (6).]

That case was very different from the present; the Plaintiff had no independent advice.

Glasse, Q.C., in reply:—

Berdoe v. *Dawson* was very like the present case, and it and the other cases which have been cited shew that the *onus* of proof is on the Defendants. The position of the parties must have been known to them, and the deed itself shews that there must have been pressure on the Plaintiffs. There has been no undue delay on the part of the Plaintiffs in asserting their rights: *Kempson* v. *Ashbee* (1).

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(1) 34 Beav. 382.

(2) Law Rep. 1 Ch. 252.

(3) 15 Sim. 437.

(4) 34 Beav. 603.

(5) Law Rep. 10 Ch. 15.

(6) 7 Beav. 551, 560.

Fry, J., after stating the case made by the Plaintiffs, and referring to the circumstances under which the daughter executed the deed of June, 1877, and the letter sent to her by her father, continued:—

It would have been very important to know what the contents of that letter were, and though I do not for one moment mean to say that the daughter has endeavoured to deceive the Court, her evidence is of such a* description that it is impossible for me to rely upon it. Evidently her attention to the matters in hand has not been sufficient to enable her to speak with exactitude as to what has taken place. Further, I must observe that the aunt, who was the attesting witness to her execution of the deed, has not been called, although, in all probability, she might have thrown light upon the circumstances under which it was executed.

As regards the elder son, it is remarkable that none of the persons who were present when he executed the deed have been called by the Plaintiffs as witnesses, neither the father nor the mother, nor the solicitor's clerk who attested the execution.

Very much the same observations arise with regard to the second son; he executed the deed in the presence of the same persons, and he has no distinct recollection of what took place.

No doubt all the Plaintiffs say that they had no knowledge of executing any instrument by which they were to charge their interests under the settlement for the benefit of their father, and they all deny that they had any intention of executing such an instrument as that which they did execute. But the daughter is the only one of them whose evidence in any way supports the particular equity on which the Plaintiffs rely. She says that her father did tell her that the deed was intended to carry into effect the transfer of the trust fund from the *London and Brighton Railway* stock to the purchase of a piece of land. But when I bear in mind the fact that she was not with her father at the time when she executed the deed, that that statement is entirely unconfirmed, and that there is no evidence as to the time when it was made, I am bound to say that it has not been sufficiently proved to make it the basis of an equity for the relief which is claimed.

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(1) Law Rep. 10 Ch. 15.

And I am bound as a Judge of fact, further to observe, that there are many and material circumstances which must have taken place before this deed was executed which must have escaped the recollection of the Plaintiffs, and which are not before me. I have come also to the conclusion that the Plaintiffs have entirely confused in their minds the transactions relating to the two deeds of November, 1876, and June, 1877. I think, therefore, that under the circumstances, it would be extremely difficult to set aside this deed on the strength of their evidence with regard to the knowledge which they had at the time when they executed it.

But what are the admitted facts in this case? It appears to me plain that the Plaintiffs, at the time when they executed the deed, had not been entirely emancipated from their father's control, and although, as I hold, there is no direct evidence upon which I can rely as proving undue pressure, yet I think that, as against the father, the Plaintiffs have shewn that a state of circumstances existed from which the Court will infer pressure and undue influence. In my judgment none of them was entirely emancipated from the father's control. None of them appears to me to have been conversant with business. The young lady had been residing in her father's house, and had not apparently, in any way, mixed in the world, except under his control and under his roof; at all events she had not resided apart from him. The two sons were students in universities, and were not familiar with legal matters. I think, therefore that, as regards the father, the circumstances are such as to cast upon him the burden of shewing that this instrument was executed by his children after receiving some independent advice, that it was executed by them with full knowledge of its contents and with the free intention of giving to him the benefit which it conferred upon him. That burden he has not attempted to discharge, in fact he has not thought proper to appear at all. Therefore as against him the judgment asked for must go.

Then the next point which arises is this, against whom does this inference of undue influence operate? Clearly it operates against the person who is able to exercise the influence (in this case it was the father) and, in my judgment, it would operate against every volunteer who claimed under him, and also against every person who claimed under him with notice of the equity thereby created, or with notice of the circumstances from which the Court infers the equity. But, in my judgment, it would operate against no others; it would not operate against a person who is not shewn to have taken with such notice of the circumstances under which the deed was executed. This view appears to me to be entirely consistent with the cases which have been cited: *Maitland* v. *Irving* (1); *Archer* v. *Hudson* (2); *Berdoe* v. *Dawson* (3); *Kempson* v. *Ashbee* (4). In the latter case Lord Justice *James* puts the question which the Court had to decide in a manner which entirely confirms me in the conclusion I have come to. "The first question," he says, "is whether the bond of 1859" (that was the security in that case) "was obtained by the undue exercise of influence of the stepfather, and was it obtained under such exercise as that the knowledge of it can be imputed to the Defendant?" I must therefore inquire whether the Defendants *Browne*, *Rogers*, and *Rock* had notice or knowledge of the circumstances upon which the equity which is alleged against them arose?

There is no evidence affecting them, except that which arises from the contents of the deed itself, and from certain portions of the correspondence which have been put in. In the first place, did they know of any actual influence improperly exercised, of any undue influence in fact? There is no evidence whatever to fix them with such knowledge, for, as I have already said, there is no evidence upon which I can rely to shew that there was undue pressure on the Plaintiffs. Did the Defendants know the ages of the Plaintiffs? There is no evidence that they did, except that they knew that the Plaintiffs were the issue of the marriage which followed upon the settlement of June, 1851, and therefore it may be said that they probably knew about what was the age of the Plaintiffs. Did they know that they were resident under their father's roof, or that they were in any way under his control, or that they were not emancipated from his control? It appears to me that there is nothing whatever to shew that they had this knowledge. On the contrary, in the description of the children given in the deed their place of residence is not mentioned, and I observe that one of the father's letters referred to a meeting of the family and friends which was to take place about Easter, 1877, after which he expressed his hope of being in a position to make a definite proposition to his creditors. From this it must have seemed to the Defendants that the Plaintiffs were assisted, not merely by the solicitor who appeared to act for them, but also by certain family friends.

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(1) 15 Sim. 437.

(2) 7 Beav. 551.

(3) 34 Beav. 603.

(4) Law Rep. 10 Ch. 15, 21.

Again, with regard to the legal advice which the Plaintiffs had. It is quite plain that Mr. *Collis* purported to act for them, and, not only so, but his letters shew that he fully realized the nature of the duty which he had undertaken, for in one of them he refers to the matter as being "a very delicate business." Finding, therefore, that a solicitor was purporting to act for the Plaintiffs, that they did, according to their own evidence, see him on some occasion with regard to business, when he appears to have conversed with them upon some subject (they say they think it was upon the question of transferring the money from one security to the other), seeing that he had realized the nature of the duty which he had undertaken, am I to come to the conclusion that he did not perform his duty to them? I cannot come to any such conclusion. Therefore, unless I am to hold that it is absolutely necessary that the solicitor who is advising the children in such a case should be a different person from the solicitor who is advising the parent, I am unable to find that the Defendants had notice of any of the circumstances from which undue influence can be inferred. For aught they knew, the children were acting independently in the matter, and so indeed the father stated that they were—that is not to be passed over. In one of his letters he stated that they were acting each for themselves. I think that the Defendants were entitled to come to the conclusion that the children were resident away from their father, not under his control, fully emancipated from him, assisted by the advice of their friends, and by the advice of a solicitor who was bound to do his duty to them.

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1881
BAINBRIGGE
v
BROWNE.

I come, therefore, to the conclusion that the Plaintiffs have not brought home to these Defendants knowledge of the circumstances from which the equity invoked arises, and as against them, therefore, the action must be dismissed, with costs.

As against the father, I must make a declaration, with costs, that the deed is not binding in any way upon the Plaintiffs.

Solicitor for Plaintiffs: *J. H. Lydall.*
Solicitors for Defendants: *Roberts & Barlow.*

W. L. C.

EDWICK *v.* HAWKES.

[1880 E. 728.]

FRY, J.
1881
May 18, 23, 24, 25.

Landlord and Tenant—Forcible Entry—License to eject—5 *Rich.* 2, *Stat.* 1, c. 8—*Public-house—Covenant by Tenant to buy Beer of Landlord only—Implied Obligation on part of Landlord.*

22ChD31

A license by a tenant to his landlord to eject him on a specified day without any process of law is void, as authorizing the commission of an act which is made illegal by the Act 5 Rich. 2, stat. 1, c. 8.

If a person, who has a legal right of entry upon land which is in the possession of a wrongdoer, is allowed to enter peaceably through the outer door, it is still illegal for him to turn out the wrongdoer with violence.

A covenant by the tenant of a public-house to purchase of his landlord all beer to be sold or consumed in or upon the premises is not broken by the tenant buying through an agent, without the knowledge of the landlord, beer made by the landlord.

Semble, that where such a covenant is entered into by a tenant there is, in the absence of express stipulation, an implied obligation on the part of the landlord to supply the tenant with such kinds of beer as he requires, and if this obligation is not fulfilled the tenant is at liberty to buy the beer which he requires elsewhere.

BY an indenture of lease dated the 10th of June, 1880, *James Wigan*, *F. W. Blunt*, and *O. L. Stephen*, brewers, carrying on business in partnership at *Bishop's Stortford*, under the firm of *Hawkes & Co.*, demised to *William Edwick*, his executors and administrators, a house and premises at *Bishop's Stortford*, known as *The Dells Beerhouse*, for a term of seven years from the 14th of June, 1880, at the yearly rent of £50, and subject to the performance and observance of certain covenants and conditions.

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The lessee covenanted (*inter alia*) that he would purchase of the lessors, their heirs, executors, administrators, and assigns, during the continuance of the demise, all beer, ale, porter, and stout (whether in bulk or in bottle), wine, brandy, and other spirit or liquor that should be sold or consumed in, upon, or from the premises. There was no covenant by the lessors except the ordinary covenant for quiet enjoyment. There was a proviso that if the lessee, his executors, administrators, or assigns should become bankrupt, or enter into or take any proceedings in order to enter into any liquidation by way of arrangement or composition with any creditors, or on any breach or non-observance of any covenants by the lessee, the lessors might re-enter upon the demised premises and re-possess and hold the same as if the demise had not been made.

Edwick paid the lessors a premium of £150 on the execution of the lease.

F. W. Blunt, one of the partners in the firm of *Hawkes & Co*, was a solicitor practising in *London*.

This action was brought by *Edwick* and his wife against the firm of *Hawkes & Co.* under the following circumstances:—

The Plaintiff took possession of the demised premises immediately after the execution of the lease. By his statement of claim he alleged that shortly after he found that the beer supplied to him by the Defendants was extremely bad, and that a large quantity of it was unfit for consumption; that he remonstrated with the Defendants without effect, and that ultimately, in August, 1880, the beer supplied to him by the Defendants became so bad that, in order to preserve his customers, he purchased from the Defendants, through a Mr. *Cundall*, as his agent, some of the beer which they were in the habit of supplying to private families.

The Defendants soon afterwards discovered this, and charged the Plaintiff with having broken the covenant in his lease, and told him that he had thereby forfeited the lease. They then induced him to sign a letter, dated the 9th of September, 1880, and addressed to them, as follows:—"In consideration that you will not take immediate steps to eject me from *The Dells*, of which I have forfeited the lease, I undertake to give you quiet possession on the 29th instant, and you may use this letter as leave and license to eject me without any process of law on that date." The Plaintiff alleged that he was in great alarm and distress of mind when told that he had forfeited his lease and at the serious loss with which he believed he was threatened, and that he signed the above letter in that belief and in consequence of that alarm and distress. He afterwards consulted his solicitor, Mr. *Hardcastle*, who, on the 30th of September, wrote to the Defendants that the Plaintiff had been advised not to give up possession of the premises.

The Defendants had, on the 29th of September, written to the Plaintiff telling him that if quiet possession of the premises was not given to them they should take possession.

The Plaintiff alleged that he and his wife had been forcibly expelled from the house by the Defendants' servants, purporting to act under the document of the 9th of September; that the wife had been seriously injured; and that the Plaintiff's stock-in-trade and furniture had been greatly damaged.

The Plaintiff *W. Edwick*, claimed to have the document of the 9th of September set aside and cancelled; £1500 damages for the acts complained of other than assaults on him, and £200 damages for the assaults; and the Plaintiff claimed £1500 damages for assaults on the wife.

By their statement of defence, the Defendants denied that they had supplied the Plaintiff with bad beer. They said that the beer which the Plaintiff purchased through *Cundall* was of a kind known in the trade as "*A. K.*," being a light bitter beer brewed for the use of private families, and sold by the Defendants at 36*s.* per barrel. They said that it was their invariable rule, as the Plaintiff well knew, not to sell this beer to publicans, but to sell to them only a kind of bitter ale, known in the trade as "*I. P. A.*," which was sold to publicans at 54*s.* per barrel. This beer was retailed by publicans as "Pale Ale," and the Defendants said that the Plaintiff had retailed the "*A. K.*," which he bought through *Cundall* as "Pale Ale," and in so doing had committed a fraud on the public, and had injured the reputation of the Defendants as brewers. They said also that the Plaintiff had committed a breach of his covenant by making the purchase through *Cundall.*

They denied that they sold the beer to *Cundall* as agent for the Plaintiff, and said that, if they had known that *Cundall* intended to resell it to the Plaintiff, they should have refused to sell it to him. They said that they told the Plaintiff on the 9th of September that they must determine his lease, but at his request agreed that he should have till the 29th of September to find a purchaser for his interest in the beerhouse, if he would sign a letter agreeing to give up quiet possession by that date, and that he voluntarily signed the letter of the 9th of September after reading it over. They denied that they had wrongfully entered the premises, and submitted that, the Plaintiff having committed a breach of his covenant by buying beer from *Cundall*, and having entered into the agreement contained in the letter of the 9th of September, they were justified in entering into possession of the premises. They denied that more force was used than was necessary to eject the Plaintiff and his family. They also denied that any injury had been done to the Plaintiff's stock-in-trade and other property, and they said that such assaults as were committed on the Plaintiff and his wife were committed by the leave and license of the Plaintiff *W. Edwick*.

By the evidence at the trial, it appeared that on the 4th of October, 1880, the Defendants' foreman went to the public-house accompanied by two men, and by one of the county police, who came at the request of the Defendants, and who warned the Plaintiff not to interfere with the Defendants' men. The Defendants were allowed to enter peaceably, and they took possession of the bar, and turned the Plaintiff *W. Edwick* out of the house, but his wife and family were allowed to remain. He afterwards returned, and was again put out by the Defendants' men on the 5th of October. He returned a second time, and was again put out on the 6th of October. On that day the wife was forcibly turned out, being carried out of the house by three of the Defendants' men.

There was medical evidence which shewed that the wife had suffered serious injuries. Two of the county police were present during the whole of the proceedings on the 6th of October, to prevent, as they said, a breach of the peace, but they did not interfere with the Defendants' men. It appeared that they had instructions to act under the directions of the Defendants' foreman. The Plaintiff's furniture and stock-in-trade were removed by the Defendants' men.

North, Q.C., and *T. L. Wilkinson*, for the Plaintiffs :—

There has been no breach of the Plaintiff's covenant to buy his beer exclusively from the Defendants, and therefore no right of re-entry had arisen. The license to eject the Plaintiff was obtained from him by undue influence and under circumstances of surprise, and was voidable by him, and he had sufficiently repudiated it before it had been acted upon. The Defendants cannot, therefore, justify their acts by the license. They were doing that which is criminal under the Act 5 Rich. 2, stat. 1, c. 8, and the Plaintiffs are entitled to damages for the assaults committed on them: *Beddall* v. *Maitland* (1); and exemplary damages ought to be given: *Merest* v. *Harvey* (2).

Cookson, Q.C., *Cracknall*, and *W. Graham*, for the Defendants :—

There was no forcible entry by the Defendants, so that such cases as *Newton* v. *Harland* (3) and *Beddall* v. *Maitland* do not apply. The entry of the Defendants' men through the outer door of the house was peaceable.

[FRY, J. :—Entry is not equivalent to possession.]

If a person is entitled to possession and enters, either himself or by his agent, in the assertion of his possession, the law immediately vests the actual possession in the person who has so entered: *Jones* v. *Chapman* (4). A lawful owner, it is true, may not enter forcibly, but that only means that he must not break open an outer door. When he has been allowed to enter peaceably through the outer door he is in legal possession, and may then break open an inner door in order to eject a trespasser; *Semayne's Case* (5). We were entitled to enter either by virtue of the proviso for re-entry in the lease, or under the Plaintiff's license, and as soon as we had entered peaceably, the Plaintiff and his family became trespassers, and we were justified in turning them out.

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(1) 17 Ch. D. 174.

(2) 5 Taunt. 442.

(3) 1 Scott, N. R. 474.

(4) 2 Ex. 803, 821.

(5) 5 Co. 91 a; Sm. L. C. 8th Ed. vol. i. p. 114.

The Plaintiff had broken his covenant, and if so, there was good consideration for the license to eject, and it was legal. But even if the covenant was not broken, but the Defendants, when they obtained the license *bonâ fide* believed that it had been broken, the license is good as a compromise of a disputed claim: *Callisher* v. *Bischoffsheim* (1); *Ockford* v. *Barelli* (2). The Defendants were therefore justified in doing all that was necessary to give effect to the license. They took every precaution to prevent a breach of the peace. In putting out a trespasser there must of necessity be some technical assault; the question is whether there was undue violence. A number of men were employed for the express purpose of preventing violence. It is lawful to employ assistance to carry out a license: *Dennett* v. *Grover* (3). The license authorized us to enter and turn out the Plaintiff and his family with such force as might be necessary.

[FRY, J.:—Would it not then be void as a license to commit that which is made a crime by the Act of *Richard* II.]

The statute only forbids a forcible entry. Under the lease and license we were entitled to expel the Plaintiff, provided that we used no undue violence: *Kavanagh* v. *Gudge* (4). The evidence shews that no excessive violence was used. In that case it was held that the Plaintiff ought to have new assigned for any excess of violence. The license was not revocable before entry, because there was forbearance on the part of the Defendants, and it was not revocable after it had been acted upon by entry. It was not necessary that the entry should be made on the 29th of September; the right was not forfeited by our giving the Plaintiff a little longer time. The statement in *Addison* on Torts (5), that a license will be a nullity "if there has been a mistake and misunderstanding between the parties without fraud," is not borne out by the authorities: *Bridges* v. *Blanchard* (6); *Davies* v.

(1) Law Rep. 5 Q. B. 449.
(2) 20 W. R. 116.
(3) Willes, 195.
(4) 7 Man. & G. 316.
(5) 5th Ed. p. 354.
(6) 1 A. & E. 544.

Marshall (1); *Roper* v. *Harper* (2). Those cases apply to wilful misrepresentation.

North, in reply:—

The covenant to buy beer only of the Defendants has not been broken by a purchase through an agent. At any rate, there was an implied obligation on the part of the Defendants to supply the Plaintiff with beer of any kind which he might require, and as they declined to supply him with "*A. K.*" beer he was at liberty to buy it of any one: *Luker* v. *Dennis* (3). The Defendants cannot take advantage of the license which was obtained by misrepresentation, though it was not wilful: *Roper* v. *Harper*. *Callisher* v. *Bischoffsheim* (4) was disapproved by *Brett*, L.J., in *Ex parte Banner* (5). Exemplary damages will be given for a mere insult: *Merest* v. *Harvey* (6).

Fry, J., after stating the facts relating to the entry of the Defendants, continued:—

The first question is whether the Defendants were, in the acts which they then committed, trespassers upon the Plaintiff's property. The second question is whether, if they were not trespassers, they did through their agents commit acts which were wrongful, unless they could justify their possession and entry, and whether they are unable to justify their possession and entry by reason of its being forcible, and therefore contrary to the statute of *Richard* II. A third question, which has been more or less discussed, but which only arises in the event of the Defendants not being trespassers, is whether, in pursuance of their lawful right to put the Plaintiff and his wife out of the property, their agents were guilty of using any excessive force. These are the three principal questions in the case. [After referring to the lessee's covenant to purchase beer only of the Defendants, his Lordship continued:—] It appears that the Plaintiff was not satisfied with the beer supplied to him by the Defendants, and, whether his complaints were justified or not, he was anxious to

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(1) 10 C. B. (N.S.) 697. 7 Jur. N.S. 1248
(2) 4 Bing. N. C. 20.
(3) 7 Ch. D. 227.
(4) Law Rep. 5 Q. B. 449.
(5) 17 Ch. D. 480.
(6) 5 Taunt. 442.

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sell at his public-house a kind of beer called "*A. K.*," which is a bitter ale made by the Defendants, that he applied to their cellarman to know whether he could sell it, and that either he received no affirmative answer from them, or, according to their evidence, he received a negative answer. I have no doubt, however, that he did not expect to get the "*A. K.*" from the Defendants, and accordingly he employed a neighbour of his, named *Cundall*, to go to the Defendants' brewery and buy for him some barrels of "*A. K.*," for which he paid the ordinary price, receiving a discount of 1*s.* a barrel, which discount the Plaintiff allowed him to keep for his trouble. The question is whether this transaction was a violation of the Plaintiff's covenant to purchase of the lessors all the beer which should be sold or consumed upon the demised premises. In my judgment it was not. I ask myself whether, according to ordinary parlance and the ordinary use of the English language, the Plaintiff did purchase that beer of the Defendants, and I conceive that I must answer that question in the affirmative. He authorized *Cundall* to purchase as his agent, although in the agent's own name, and, whatever the mind of the Defendants may have been in selling, the mind of the Plaintiff in purchasing clearly was to buy through an undisclosed agent from his lessors, and it appears to me that that is what he has done. What the Defendants say is this—We make two kinds of bitter beer, "*I. P. A.*," or *India* Pale Ale, and "*A. K.*" The *India* Pale Ale is the only kind of bitter ale which we supply to the public-houses which are tied to us. The "*A. K.*" we supply to private families, and in some cases we supply it to public-houses which are free, that is, not tied to us. They suggest that the Plaintiff was guilty of a fraud upon the public in selling the "*A. K.*" ale as bitter ale, and it is, they say, to protect the public from such a fraud that they are unwilling to sell the "*A. K.*" ale to publicans. I have nothing to do with the arrangements which they make with publicans. It appears to me that there is no fraud upon the public in selling as bitter ale that which is bitter ale, because the "*A. K.*" is as much bitter ale as the "*I. P. A.*"; it has been so described by the Defendants themselves. And I cannot help observing, that, however anxious the Defendants may be to prevent the sale of the "*A. K.*" to the public as bitter ale by the publicans who are tied to them, they are not unwilling to sell it themselves to other publicans, who buy it of them, and who, I suppose, sell it as bitter ale, because they cannot sell it as anything else. But, supposing that I am wrong in that conclusion, there is another argument of Mr. *North's* which requires consideration. He says that according to the true construction of this covenant the lessee is the arbiter of what kinds of beer, what kinds of spirits, what kinds of liquor, he shall sell, and that there is an implied contract by the lessors that they will supply such ale, such beer, such spirits as the lessee may require, or, at any rate, that he is liberated from his obligation to purchase of them in respect of any kind of beer or other liquor for which he applies to them and with which they cannot or will not supply him; and, therefore, if they declined, as, according to their own story, they did, to supply him with the "*A. K.*," he was at liberty to buy through *Cundall*, or of any one. If I am right in the conclusion which I have already expressed on the question of fraud, it is unnecessary for me to express any opinion as to this implied obligation. But I think that Mr. *North's* argument is well worthy of consideration, and I am inclined to think that his construction of the covenant is the true one. I hold, therefore, that there was no breach of this covenant by the Plaintiff, and, consequently that the proviso for re-entry contained in the lease did not take effect.

The Defendants having become aware of what the Plaintiff had done, sent for him on the 9th of September. They expressed their annoyance and indignation, and told him that he had committed a breach of his covenant, and had thereby forfeited his lease. That statement they appear to have made with great positiveness, and they made it with great authority as against him, because they spoke not merely as influential brewers and as his landlords, but they spoke through the mouth of Mr. *Blunt*, one of the partners, who is an experienced *London* lawyer. That statement, in my opinion, was erroneous, though I think it was made in perfect good faith by Mr. *Blunt*. The result of that statement was that the Plaintiff was induced to sign the document or license of the 9th of September. On the 24th of September he consulted his solicitor, and on the 30th of September the solicitor

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informed the Defendants that possession would not be given up by the Plaintiff. The Defendants had on the previous day given notice to the Plaintiff that they intended to act upon the license which had been obtained from him on the 9th of September.

Before passing on I must make some observations upon the license itself. [His Lordship read the license.]

In the first place, the document evidently proceeds upon the footing of there having been a forfeiture of the lease; that is the basis upon which the parties are treating. It is apparent that the Plaintiff recognises that the lease has come to an end, and he undertakes to give the Defendants quiet possession on the 29th of September. But, according to the construction which I put upon the document, and which, if I have understood them rightly, the Defendants' counsel put upon it, much more is expressed by this instrument—viz., an authority to eject the Plaintiff without any process of law, and a power for that purpose to enter upon the property, and upon so entering to use all necessary force in putting out the Plaintiff and his family. If so, the document appears to me to be void as being in effect a license to commit a crime, because the statute of Rich. 2 has provided that, even where there is a legal right of entry, no man shall enter with strong hand, nor with multitude of people, but only in a peaceable and easy manner. Any violence, therefore, which is used for the purpose of obtaining an entry upon land which is in the possession of another, anything amounting to a strong hand, is a violation of that statute, and consequently, according to my view of the true construction of this instrument, it was void in its inception, as being in effect a license to commit that which is contrary to the public law of the country. But, even if that be not so, I think the instrument is voidable on a ground which I have already indicated. It was obtained from the Plaintiff upon the suggestion that his lease had been forfeited, a suggestion which emanated from the Defendants in good faith, but in error. Such an instrument so obtained is voidable according to the well-known case of *Rawlins* v. *Wickham* (1), and other cases in which an executed contract has been rescinded on the ground that it has been obtained by means of an innocent misrepresentation.

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(1) 3 De G. & J. 304. 5 Jur NS 278

And I think that by Mr. *Hardcastle's* letter of the 29th of September, or, if not by that, by virtue of the Plaintiff's refusal to give up possession on the 4th of October, his mind to rescind the voidable agreement was sufficiently made known to the Defendants, and that from that time the voidable agreement became void.

The Defendants' letter of the 29th of September is a very strong confirmation of my view of the true construction of the license of the 9th of September, because the letter gives the Plaintiff notice that in default of quiet possession being given by him they will enter. It is evident that they understood the instrument of the 9th of September as authorizing them to use force in re-entering. On the 4th of October the Defendants' foreman went to the premises accompanied by a policeman and by two men, and the Plaintiff then said he should not give up possession. It appears to me that those persons were employed to some extent in overawing the Plaintiff, and I must couple this proceeding with the Defendants' letter of the 29th of September, which had been delivered to the Plaintiff on the 30th of September. The Plaintiff was put out with no great violence, he sustained no injury. He returned, and was put out again. He returned again, and he was put out of possession again on the 6th of October. [His Lordship then stated the effect of the evidence as to the ejectment of the wife, and continued:—]

I come to the conclusion that very considerable force and violence were used towards the wife, and I think she was right in point of law in saying, as she did, that she was not bound to leave. The result is that, in my judgment, damages must be assessed for the wrongs done to both the husband and the wife. I confess I wish the duty of assessing the damages had fallen on someone else, but as it falls upon me, I must undertake it. Now, with regard to the husband, I do not think that he suffered any physical injury. I think he has suffered considerable injury in his trade, and some injury to his property which was turned out. I take into consideration, and it is important that I should do so, the value of his term in the property from which he was ejected by the Defendants. I assess the damages in respect of all those injuries, including something for the assault and wrong done to him, at the sum of £250. And for the injury and wrong done to the wife I assess the damages at £200.

I might be content to leave the matter here, had not very important questions been raised in the course of the discussion with regard to the right of landlords to enter upon premises in the occupation of their tenants, and were it not that, in my judgment, the damages which I have assessed in respect of the wife may, under the circumstances, be justified, even if I am wrong in thinking that the Defendants were trespassers. If on the 4th of October they had a right of entry which they might have put in force through proper means of law I think they nevertheless made a wrongful entry on that date. I couple the amount of force which they actually displayed on that entry—four men—with their previous letter of the 29th of September, I couple it with the Plaintiff's statement that he should not give up possession, and I think that the acts, which began with that entry on the 4th of October, were one continued series of acts until the wife had been finally ejected on the afternoon of the 6th of October, and until that ejectment the Defendants, in my judgment, never recovered actual possession of the property. Mr. *Cookson* says that the statute of *Richard* only applies to entry upon land, and that if I who have a title can get peaceably over the border of the land which is in the possession of a person who has no title, the possession follows the title; I am then in possession, and I may use all necessary force to put out the person who had been in possession. In my judgment that is not the law. The statute of *Richard* II., as I have already pointed out, prohibits an entry with a strong hand, which means, as I understand it, coming with a multitude of people or any excessive number of persons. The possession can only be taken in a peaceable and easy manner. If the operation of the statute is confined to the mere act of getting over the border, the edge, of the property in question peaceably, the statute is evidently not adequate to meet the evil which it was intended to repress, viz., the evil of persons who have a right, as well as those who have not a right, causing disturbance, inaugurating civil war, for the purpose of obtaining possession of that which is or which they claim to be their property. Accordingly, it appears to me to be clear law, and

I desire to restate it, that, if an entry be made peaceably, and if, after entry made, and before actual and complete possession has been obtained, violence be used towards the person who is in possession, that is criminal within the statute of *Richard* II.

Viner's Abridgment (1) (referring to *Lambard's* Eirenarcha) lays down the law in these terms: "If one enters peaceably, and when he is come in, useth violence; this is a forcible entry." In the same way in *Bacon's* Abridgment the law is laid down thus: "If a man enters peaceably into a house, but turns the party out of possession by force, or by threats frights him out of possession, this is a forcible entry." And there is the following passage in *Hawkins*' Pleas of the Crown (2): "It is to be observed, that wherever a man, either by his behaviour or speech, at the time of his entry, gives those who are in possession of the tenements which he claims just cause to fear that he will do them some bodily hurt, if they will not give way to him, his entry is esteemed forcible, whether he cause such a terror by carrying with him such an unusual number of servants, or by arming himself in such a manner, as plainly intimates a design to back his pretensions by force, or by actually threatening to kill, maim, or beat those who shall continue in possession, or by giving out such speeches as plainly imply a purpose of using force against those who shall make any resistance; as if one say that he will keep his possession in spite of all men." Applying that principle to the circumstances of the present case; looking at the threat contained in the Defendants' letter of the 29th of September, at the way in which the police on the evening of the 4th of October warned the Plaintiff not to lay hands on the Defendants' men, at the way in which the police were placed under the instructions and directions of the Defendants' foreman, at the fact that he came with more men than were necessary for getting actual possession, and at the way in which those men were assisted by others from time to time; looking, as I do, at the whole series of doings from the 4th to the 6th of October as one continued act, I come to the conclusion that there was, not merely a forcible entry, but an independent wrong done to the Plaintiff's wife in the course of that forcible entry which, according to the doctrine of *Newton* v. *Harland* (1), and that class of cases gives a cause of action.

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(1) 2nd Ed. vol. xiii. p. 380.

(2) 8th Ed. vol. i. p. 501.

I have made those observations because, in my judgment, it is important that there should be no misunderstanding as to the position of persons who have a right of entry on land. Their right is to enter in a peaceable and easy manner, and if they cannot do so they must resort to the Courts. In no other way can the peace and quiet of this country be maintained, and in no other way can the relation of landlord and tenant be prevented from resulting in such acts of violence and disturbance as I regret to say have occurred in the present case.

I therefore give the Plaintiffs the damages which I have mentioned, and I give them also the whole costs of the action.

North, Q.C.:—Your Lordship will make a declaration that the document of the 9th of September is not binding upon the Plaintiff.

FRY, J.:—I do not see why you want that now. I have given you damages for the term, and therefore the term is at an end, and that document is immaterial. I think that if I were to make a declaration that the document is void, it would imply that the term was set up again. I wish to avoid any doubt whether you have recovered damages for the term.

Solicitor for Plaintiffs: *H. T. Hardcastle.*

Solicitors for Defendants: *Walker, Son, & Field,* agents for *W. Gee, Bishop's Stortford.*

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(1) 1 Scott, N. R. 474.

W. L. C.

DAVIDSON *v.* KIMPTON.

FRY, J.
1881
June 17.

20 Ch D 752

Will—Construction—" Survivor "—Woman past Child-bearing.

A testator bequeathed the dividends of a sum of £10,000 Consols unto and equally between his four daughters, and from and immediately after their several and respective deceases he bequeathed the £10,000 to their children respectively—viz., one-fourth part thereof unto and equally between the children of each daughter. And, in case any one or more of the daughters should die without leaving issue her or them surviving, he bequeathed the share or shares of the stock so bequeathed to and intended for the issue (had there been such) " unto the survivors or survivor " of the four daughters, equally if more than one, and if but one, to that one, absolutely. Three of the daughters married, and died leaving children. The fourth was the longest liver, and was a spinster of the age of fifty- four :—

Held, that on her death without leaving issue she would be entitled to her own one-fourth share of the £10,000 absolutely; that it might be assumed that she would never have any children; and that the share might be transferred to her at once.

Maden v. *Taylor* (1) approved and followed.

JOHN DAVIDSON, by his will, dated the 21st of May, 1832, bequeathed to his wife, *Ann Davidson*, the interest and dividends arising from a sum of £10,000 Consols for her life, and he declared that the interest and dividends was so given to her for her own maintenance, and also for the maintenance, clothing, education, and bringing up of his two natural daughters by her previous to his marriage with her, namely, *Mary Ann Davidson* and *Martha Davidson*, as well as for the maintenance, clothing, education, and bringing up of his other two daughters, *Elizabeth Sophia Davidson* and *Susannah Davidson*, until they the said *Mary Ann Davidson* and *Martha Davidson*, and also the said *Elizabeth Sophia Davidson* and *Susannah Davidson*, should respectively attain the age of twenty-one years, should they so long remain unmarried. And from and immediately after the death of his wife the testator gave the interest and dividends of the £10,000 Consols unto and equally between or among the said *Mary Ann Davidson* and *Martha Davidson* and the said *Elizabeth Sophia Davidson* and *Susannah Davidson* for their separate use

(1) 45 L. J. (Ch.) 569. WN(1876)101

respectively. The will proceeded thus: "And from and immediately after the several and respective deceases of the said *Mary Ann Davidson* and *Martha Davidson* and the said *Elizabeth Sophia Davidson* and *Susannah Davidson,* I give and bequeath the said £10,000 Bank Annuities unto their children respectively in the proportions following (that is to say) one fourth part or share thereof unto and equally between or among the children of the said *Mary Ann Davidson,* one other fourth part or share thereof unto and equally between or among the children of the said *Martha Davidson,* one other fourth part or share thereof unto and equally between or among the children of the said *Elizabeth Sophia Davidson,* and the remaining fourth part or share thereof unto and equally between or among the children of the said *Susannah Davidson.* And in case any one or more of them the said *Mary Ann Davidson* and *Martha Davidson,* or the said *Elizabeth Sophia Davidson* and *Susannah Davidson* shall depart this life without leaving any lawful issue her or them surviving, I give and bequeath the part or share or parts or shares of the said stock so bequeathed to and intended for the issue (had there been such) of her or them so dying without issue unto the survivor or survivors of them the said *Mary Ann Davidson* and *Martha Davidson* and the said *Elizabeth Sophia Davidson* and *Susannah Davidson,* equally if more than one, and if but one then to such one, to and for their or her own use and benefit absolutely." And the testator bequeathed the residue of his estate unto and equally between and among his wife and his said four daughters absolutely.

The testator died on the 9th of February, 1840. His wife had died before him. The four daughters survived him. *Elizabeth Sophia,* on the 4th of July, 1848, married *Richard Doughty.* She died in February, 1864, leaving four children. *Mary Ann,* on the 15th of March, 1855, married *J. B. Harrison.* He died on the 4th of March, 1857, and on the 15th of November, 1859, she married *A. E. Harris.* He died on the 16th of August, 1875, and she died on the 28th of July, 1876, leaving four children. On the 18th of October, 1864, *Susannah Davidson* married *George Symondson,* and she died on the 3rd of February, 1870, leaving two children.

This suit was instituted for the administration of the testator's estate.

A petition was now presented by *Martha Davidson*, who had never married and who was in the fifty-fifth year of her age, asking that £2500 Consols, part of the £10,000 Consols which had been transferred into Court, might (subject to the payment of legacy duty and costs) be transferred to her.

J. Pearson, Q.C., and *F. T. White*, for the Petitioner:—

The Petitioner, if she dies without issue, will be entitled absolutely to one-fourth of the fund, as the "survivor" within the meaning of the gift.

[FRY, J.:—You say she would survive herself?]

Maden v. *Taylor* (1) is in point. There a testator gave real and personal estate to trustees, on trust for four nieces for their respective lives, as tenants in common, and if any of them should die without issue, he directed that the share or shares of her or them so died should go to the survivor or survivors of them and their heirs. Two of the nieces died leaving children, and a third died a spinster. The fourth was unmarried and over sixty. *Jessel*, M.R., held that, under the gift over to the survivor of the nieces, she was entitled to her own one-fourth share absolutely.

The intention is that a daughter who dies without issue shall take her one-fourth absolutely if none of her sisters be then living. The question is, who is the survivor of the class of daughters at the time when the gift over is to take effect: *In re Corbett's Trusts* (2). At the age which the Petitioner has attained the Court will assume that she cannot have any children. *Croxton* v. *May* (3) does not apply.

Cookson, Q.C., for the children of the deceased daughters:—

There is no absolute gift to the daughters in the first instance. The testator has distinguished between the "interest and dividends" and the *corpus* of the £10,000, and in such a case a gift of the "interest and dividends" does not carry the *corpus*.

(1) 45 L. J. (Ch.) 569. WN(7 [illegible] (2) Joh. 591. 6 Jur [illegible]
(3) 9 Ch. D. 388.

FRY, J.
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There is no divesting in favour of the issue, but a continuity of gift. *Maden* v. *Taylor* (1) is distinguishable, or, if not, it should not be followed. As to the meaning of the word "survivor," *In re Clark's Estate* (2) shews that contemporaneous existence is not necessary in order that one person may be the "survivor" of another. But the "survivor" must be a different person from the person on whose death the gift is to take effect. If the words are read "others or other," the children of the deceased daughters will take through their parents, as settlements were made on their marriages. *In re Arnold's Trusts* (3) is an authority for so construing the word "survivor," though that decision has not been viewed with favour: *Wake* v. *Varah* (4); *Jarman* on Wills (5).

FRY, J.:—

The question which arises is rather a peculiar one. The Petitioner is the longest liver of the four daughters. [His Lordship read the gifts in question.] In my judgment there was an anxious desire on the part of the testator to give over the shares of his daughters in the £10,000, in the first place, in the event of their dying leaving issue, and, in the next place, in the event of their dying and leaving no issue. In the case of the death of a daughter without issue, he contemplates that her share shall go over to the survivors, or to the one survivor of the daughters. Inasmuch as a person cannot be his or her own survivor, it remains to inquire whether the real meaning of the words is not "longest livers, or longest liver" of the class of daughters. If the words are read in that way, the gift will operate exactly as the testator intended, viz., to give the share of the deceased daughter to three, two, or one of the daughters, as the case may be. The gift would be to the persons who for the time being are properly described as the survivors of the class, that is, those members of the class who have survived the other members of the class. That, in my view, is the true meaning of the words, and it will apply to the Petitioner. She has not survived the class of daughters, but she is the longest liver of the class. I might leave the case with this expression of my opinion. But the Master of the Rolls, in the very similar case of *Maden* v. *Taylor* (1), came to a very similar conclusion, and he was greatly influenced by the consideration that it was not likely that the testator should have intended that, if all the nieces should die without issue, the longest liver of them should take the shares of her sisters absolutely, but should take her own share only for her life.

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(1) 45 L. J. (Ch.) 569. WN(7[illegible])101

(2) 3 D. J. & S. 111.

(3) Law Rep. 10 Eq. 252.

(4) 2 Ch. D. 348.

(5) 4th Ed. vol. ii. pp. 700 *et seq.*

In the present case there is an alternative construction which will equally prevent the failure of the gift. The income is in the first instance given to the daughters absolutely, and that is equivalent to a gift of the capital to them. If my construction of the word "survivor" is wrong, then the gift over operates only in the event of the daughters dying and leaving issue, and in the event of their dying and leaving no issue and leaving other daughters or another daughter surviving them; but the event of a daughter dying leaving no issue, and leaving no other daughter surviving her, is not provided for, and in that case I should hold that the original gift continued in operation. I may illustrate my meaning thus. Suppose a testator had given a fund equally between *A.*, *B.*, *C.*, and *D.*, and on the happening of a specified event had given *A.'s* share to *X.*, *B.'s* share to *Y.*, and *C.'s* share to *Z.*, but had not given over *D.'s* share at all: on the happening of the event the original gift to *D.* would remain in force. I hold, therefore, that the Petitioner would be entitled to her own share of the £10,000 absolutely if she should die without leaving issue, and that by reason of her age it may be assumed that she will never have any children, and her share may be transferred to her now.

Solicitors: *Letts Brothers.*

W. L. C.

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(1) 45 L. J. (Ch.) 569. Int(76/101

FRY, J.
1881
June 16, 17, 18.

In re CHASTON.
CHASTON *v.* SEAGO.

[1880 C. 01077.]

Will—Construction—Divesting of Legacy—Uncertainty—Gift over of Legacy or so much thereof as shall not have been paid to or received by Legatee—Words—Paid to or received by.

Pat 636-8

A gift over of a legacy or so much thereof as should not have been paid to or received by the legatee:—

Held, not to be void for uncertainty, on the ground that the words referred, not to the time of actual payment or receipt, but to the time when it was the duty of the executors to pay the legacy.

In re Arrowsmith's Trusts (1) approved and followed.

Hutchin v. *Mannington* (2) and *Martin* v. *Martin* (3) distinguished.

Bubb v. *Padwick* (4) disapproved.

Johnson v. *Crook* (5) approved.

SPECIAL CASE.

John Chaston by his will, dated the 18th of March, 1826, appointed his wife *Sarah Chaston*, his son *John Browne Chaston*, and *John Elph* and *Richard Miller* executors thereof. And he devised his real estate to his wife during her life or widowhood, and after her decease or remarriage he devised his real estate to the use of the said *John Elph*, *Richard Miller*, and *J. B. Chaston*, their heirs and assigns, upon trust for sale as therein mentioned. And the testator made certain specific and pecuniary bequests, and directed his executors and trustees to set apart and invest a sum of £320 as therein mentioned. And he bequeathed the residue of his personal estate to the said *John Elph*, *Richard Miller*, and *J. B. Chaston* upon trust for conversion, and he directed his trustees to stand possessed of the moneys to arise from such conversion upon trust to invest the same and to pay the income thereof to his wife so long as she should continue his widow, and in the event of her marrying again he directed his trustees to invest so much of the money arising from the sale of his real estate and his residuary personal estate as would produce the annual sum of £100, which he directed to be paid to his wife during her life, and he directed his trustees at the decease of his wife, if she should continue his widow, to divide the money arising from the sale of his real and residuary personal estate into nine equal parts, and in case she should marry again, then into the same number of parts on her marrying again after deducting and investing funds to produce the said annuity of £100. And he directed his trustees to divide into the same number of parts at the decease of his wife the sum so set apart. And the testator directed his trustees "to pay one equal ninth part or share of the said moneys when such division takes place (dependent on the marriage again of my said wife as hereinbefore mentioned) unto the said *John Browne*, my son, to whom I do hereby give and bequeath the same absolutely to and for his own use, benefit, and disposal, and one other equal ninth part or share thereof (dependent as aforesaid) unto my daughter *Mary Browne*, the wife of *John Watling*, to whom I do hereby give and bequeath the same absolutely to and for her own use, benefit, and disposal." And the testator directed his trustees to pay one other ninth part of the said moneys to each of his sons *George Chaston*, *Daniel Chaston*, *Alfred Chaston*, and *Benjamin Chaston* in terms similar to the bequest of one ninth share to *John Browne Chaston*, and he directed his trustees to pay one ninth share to each of his daughters *Sarah Gowing* and *Ann Elizabeth Shearing* in terms similar to the bequest of one ninth share to *Mary Browne Watling*. And he directed his trustees to invest the remaining ninth part of the said moneys, and to stand possessed of the said sum of £320 and the said remaining ninth part respectively upon trust during the life of his son *Robert Chaston* to pay the income thereof into his hands.

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(1) 29 L. J. (Ch.) 774; 2 D. F. & J. 474. 7 Jur NS. 9

(2) 1 Ves. 366.

(3) Law Rep. 2 Eq. 404.

(4) 13 Ch. D. 517.

(5) 12 Ch. D. 639.

The will proceeded as follows:—

"And I do hereby direct and declare that, in case of the death of any one or more of my said sons and daughters before the said legacies and bequests hereinbefore by me given and bequeathed to them or any part thereof shall have been paid to him, her, or them so dying, or of the death of my said son *Robert* before the said dividends, interest, and income arising from the aforesaid trust moneys, stocks, funds, and securities in which a life interest is hereinbefore given to him shall become due and payable by this my will, or at any time after they shall have become due and payable, without leaving issue lawfully begotten, they my said executors and trustees and the survivors and survivor of them, and the executors or administrators of the survivor of them, shall stand and be possessed of the said legacies and bequests of him, her, or them so dying, or so much thereof as shall not have been paid to him, her, or them, and of the said moneys hereinbefore directed by me to be put and continued out at interest for the benefit of my said son *Robert*, in trust for the others and other of them, to be equally divided between them my said children (if more than one) share and share alike, and to be payable and paid to him, her, or them respectively at the time or respective times hereinbefore appointed for the payment of his, her, and their original share and shares. And in case of the death of any one or more of them my said sons and daughters leaving issue lawfully begotten, that they my said executors and trustees and the survivors and survivor of them, and the executors and administrators of such survivor shall stand and be possessed of the legacy and bequest or legacies and bequests of the aforesaid trust moneys, stocks, funds, and securities of him, her, or them so dying, or so much thereof as shall not have been paid to him, her, or them so dying, for his, her, or their child or children respectively, and pay the share of each son or daughter so deceased unto his, her, or their child if only one, and, if more than one, all and every the children of each deceased son or daughter respectively, to be equally divided between them if more than one, share and share alike, to whom I do hereby give and bequeath the same accordingly, and to be vested interests in and payable and paid to such of the same children respectively as being a son or sons shall live to attain the age of twenty-one years, or being a daughter or daughters shall live to attain that age or be married, or as soon after those respective ages, days, or times as circumstances will admit, and with benefit of survivorship between or among the same children as well as to the original share or shares (or such part thereof as shall not have been received by them) of their fathers or mothers respectively as any additional share or shares in the event of the decease of any one or more of them my said children without having received all or some part of his or her share or respective shares."

The testator died in April, 1827. His will was proved by his widow and his son *J. B. Chaston*, the other two executors having renounced probate. The widow did not marry again, and she died in May, 1832. All the nine children of the testator named in the will survived him, and also survived the widow. Of the eight children other than *Robert*, all but *Daniel* died in the lifetime of *Robert*. Two of the seven, viz., *Alfred Chaston* and *Benjamin Chaston*, died without leaving issue. Each of the other five left children or remote issue. *Robert Chaston* died without leaving issue, on the 14th of November, 1879.

This special case was stated by consent, pursuant to Order XXXIV. of the Rules of Court, 1875, for the opinion of the Court as to the mode in which that share of the testator's estate in which *Robert Chaston* took a life-interest ought to be divided.

The Plaintiff was *Daniel Chaston*. The Defendants were *W. R. Seago* (who was the executor of *Susanna Chaston*, the surviving executrix of *John Browne Chaston*); *Louisa Jane Chaston*, widow (who was the legal personal representative of *Alfred Chaston* and *Benjamin Chaston*); and *Arthur Watling* (who was the son of *Mary Browne Watling*, and had been appointed by the Court to represent the interests of all the children of deceased children of the testator).

Glasse, Q.C., and *W. Phipson Beale*, for the Plaintiff:—

The Plaintiff is entitled to the whole of *Robert's* share. The words "others or other," means "others or other" of the children who are surviving at the time of the death without issue of the child whose share is to go over.

Farwell, for the first Defendant:—

The share of *Robert* is divisible into eighths, and the personal representatives of those children who are dead take their shares. The gift over to the children of children who die leaving issue does not apply to accrued shares, but only to original shares: *Cambridge* v. *Rous* (1); *Wilmott* v. *Flewitt* (2); *Theobald* on

(1) 25 Beav. 409.

(2) 13 W. R. 856. 11 Jur. N.S. 820

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Wills (1). A gift over of so much of a share as shall not have been paid to or received by a legatee is void for uncertainty: *Martin* v. *Martin* (2); *Minors* v. *Battison* (3); *Collison* v. *Barber* (4); *Johnson* v. *Crook* (5); *Bubb* v. *Padwick* (6).

Langworthy, for the Defendant *Louisa Jane Chaston*, adopted the same line of argument, and referred also to *Haydon* v. *Rose* (7).

Cookson, Q.C., and *Bunting*, for the children of deceased children of the testator:—

The share of *Robert* is divisible into sixths. The two children who died before *Robert*, leaving no issue, take nothing. The gift over of so much of a share as shall not have been paid or received is not void for uncertainty: *Hutchin* v. *Mannington* (8); *Elwin* v. *Elwin* (9); *Whitman* v. *Aitken* (10); *Gaskell* v. *Harman* (11); *In re Arrowsmith's Trusts* (12). In *Johnson* v. *Crook*, *Jessel*, M.R., held that a gift over in case of the death of a legatee, "before he shall have actually received" his share, was good. This is contrary to *Martin* v. *Martin*. No doubt *Johnson* v. *Crook* has been disapproved by Vice-Chancellor *Malins* in *Bubb* v. *Padwick*, and apparently also by Vice-Chancellor *Hall* in *Roberts* v. *Youle* (13). But the words in the present case are not "actually paid or received," and the authorities which deal with those words do not apply. Payment means the time when payment ought to be made according to the directions of the will, *i.e.*, the death of the tenant for life. Indeed, on the true construction of this will no question of divesting arises. No part of the share of *Robert* ever vested in the children of the testator who died without issue; or at least the vesting in them and the divesting in favour of their children took place *uno flatu*.

Glasse, in reply:—

The death of *Robert* is the period for the division of his share.

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(1) Page 367.
(2) Law Rep. 2 Eq. 404.
(3) 1 App. Cas. 428, 452.
(4) 12 Ch. D. 834.
(5) Ibid. 639.
(6) 13 Ch. D. 517.
(7) Law Rep. 10 Eq. 224.
(8) 1 Ves. 366.
(9) 8 Ves. 547.
(10) Law Rep. 2 Eq. 414.
(11) 11 Ves. 489.
(12) 29 L. J. (Ch.) 774; 2 D. F. & J. 474. 7 Jur NS 9
(13) 49 L. J. (Ch.) 744. W N 80/136

The question is, who were the surviving children of the testator then, and the Plaintiff was the only surviving child.

FRY, J., after stating the general effect of the will, continued :—

The first question arises on the first of the two gifts over, the Plaintiff claiming, as the sole survivor of the nine children, to be entitled to the entirety of *Robert's* share.

The gift over is to "the others and other of my said children." Other than whom? *Primâ facie* it would seem to mean other than the child who has died, or, to take the particular case, other than *Robert*, in which case it would go over to the other eight children. But the difficulty in the way of that construction is this, that the testator has clearly contemplated that the class to which it is to go over will be or may be a diminishing class, and may consist of one person only, because it is to go to the "others or other," and to be equally divided between them if more than one. It cannot, therefore, in my judgment, include the whole of the children other than the child on whose death the gift is to take place. I must introduce some words of contingency, or in some way make the class one which may diminish by death or by some other event. It is suggested on behalf of the Plaintiff that the words "others or other" should therefore be read survivors and survivor, and, of course, that would diminish the class, and would render sensible the expression "if more than one." It is suggested, on the other hand, that the class consists of all the children other than the children who die or have died without leaving lawful issue, and, as that would be a diminishing class, full effect would be given to the words "if more than one." It is not very easy, perhaps, to choose between the two constructions, but I think the latter is the better one, and that the words "others and other" mean the children other than those upon whose death the gift over is to take effect. The result is that, in my judgment, *Alfred* and *Benjamin*, having died before *Robert*, and having been children in the class on whose death that gift over might take effect, will take nothing under the gift over on the death of *Robert*, and, consequently, that, on the death of *Robert*, his share became divisible into six parts. One of those shares of course will be taken by *John*, and *John* died leaving issue, and thereupon arises the second question which is on the second gift over.

The question upon that is twofold. In the first place, does the gift over relate to the added or accrued shares? Does the gift over relate only to the original ninth share taken by *John*, or does it relate to the share of *Robert's* share which is also taken by *John?* [His Lordship read the gift.] Now, in the first place, I find words of plurality, "legacy or legacies, bequest or bequests." If the gift over is to apply only to the original share, there is no meaning in the added words. But the added words are there, and I must give them some meaning, and I can see no meaning so natural as to apply them to the accrued shares. Further than that, there is this observation, that the clause would apply equally to *Robert* and all the others, because *Robert* died without leaving lawful issue, and another child might die without leaving lawful issue, and the testator, when he comes to deal with the disposition of the property under the second gift over, says that there is to be benefit of survivorship between the children of children "as well as to the original share or shares (or such part thereof as shall not have been received by them) of their fathers or mothers respectively, as any additional share or shares." Therefore, I have in the latter part of the clause an express reference to the accrued or added shares. In my judgment it is perfectly plain that the clause does operate upon the added, as well as the original shares.

The second question on the second gift over is this: Is the gift over void for uncertainty? The gift over is of the bequest or bequests, "or so much thereof as shall not have been paid to him, her, or them so dying." I find that described subsequently in these words, "such part thereof as shall not have been received by them." What then is the meaning of the words "received by them," or "paid to them" in this clause? Upon the words of this will I come to the conclusion that "paid" and "received" refer, not to the time of actual payment or receipt, but to the time when the payment or receipt ought to take place, and for this reason, that in the previous clause there is a reference to the shares or parts of the shares which have not been paid, and I find that they are to be "payable and paid at the time or respective times hereinbefore appointed for the payment" of the original

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shares. I cannot help thinking that the reference to the time appointed for payment and the reference to the payment really mean the same thing, and that the testator by payment meant the time appointed for payment. Further than that, it is to be observed that a point almost precisely similar was decided in *In re Arrowsmith's Trusts* (1), and there Vice-Chancellor *Kindersley* made this observation (2): "If the widow had been entitled to a life interest in the fund, beyond all doubt her death would have been the moment of payment." But, inasmuch as she had no such interest, he held that the words "dying before receiving their respective shares" meant the termination of the period which the law usually allows to executors for the payment of legacies, that is, twelve months from the testator's death. That case went to the Court of Appeal, who affirmed the decision of the Vice-Chancellor, Lord Justice *Turner* intimating, however, a doubt whether, supposing the executors had been in a position to pay the legacies before the expiration of the year, a person who had died after the period when they might have been paid and before the expiration of the year, would have lost his legacy. Lord Justice *Knight Bruce* agreed with Vice-Chancellor *Kindersley*.

I had to consider a very similar point in *Collison* v. *Barber* (3), upon the words "division of my estate," and I came to the conclusion, upon the authority of *In re Arrowsmith's Trusts* and the language of Lord *Selborne* in *Minors* v. *Battison* (4), that the words ought to be read as referring to the period at which the division ought to be made by the executors; that there would be less difficulty in ascertaining that period than in ascertaining the period of actual payment.

In the present case there is no difficulty at all as to the time at which the payment ought to be made. The testator sets aside the whole of his residuary estate for the benefit of his widow during her life. If she dies unmarried, then the period of her death is clearly the period of payment. If she marries again, then the time of her marriage is clearly the period of payment of everything, except the fund appropriated to meet her annuity, and then, on her death after having married again, her death is clearly the period of payment of the fund set aside to answer the annuity. If the widow died before the testator, so that the gifts for her benefit failed, then the twelve months, or, if the view of Lord Justice *Turner* is right, such earlier period as the legacies might have been paid by the executors, would have been the period of payment. But it is said that there are authorities which compel me to hold that the gift over is too uncertain. Now what are they? One is *Hutchin* v. *Mannington* (1), where the words were essentially different from what they are here. The words there referred to death before the legatee might have received the legacy. Whether the words in the will were "may receive the legacy," or "might have received the legacy," I do not quite know; and I observe that learned Judges in quoting the case have referred to it differently in that respect. I think the probability is the words were "might have received the legacy," because the reporter has placed those words in marks of quotation (2), and because it is apparent that the inquiry which Lord *Thurlow* declined to direct was not, in his view, whether the money had been received, which would probably have been the true construction of the word "may," because "may" would include "shall," but whether it "might have been received." He says this (3): "Suppose he had given a real estate in the manner you specify, it is clear that it will neither depend upon the caprice of the trustee to sell, for that would be contrary to all common sense, nor upon his dilatoriness: in some way it may be sold immediately; but I should not inquire when a real estate might have been sold with all possible diligence; for it might be the very next day or that very evening; and therefore the Court always in such a case considers it as sold the moment the testator is dead." Therefore it is quite plain he considered the inquiry would have been what might have been done, which is a very vague one. The other case is *Martin* v. *Martin* (4), before Lord *Hatherley*, then Vice-Chancellor *Wood*, and there the words were "before they

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(1) 29 L. J. (Ch.) 774.

(2) Ibid. 777.

(3) 12 Ch. D. 834.

(4) 1 App. Cas. 428, 452.

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(1) 1 Ves. 366.

(2) In some of the editions of Vesey's Reports the words placed in marks of quotation are "may have received the legacy."

(3) 1 Ves. 367.

(4) Law Rep. 2 Eq. 404.

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shall have actually received," and the Vice-Chancellor thought that the law in that case would interfere to prevent effect being given to those words, the time of actual receipt being too uncertain. Lord *Selborne* undoubtedly adopted that view in *Minors* v. *Battison*, in the House of Lords, and said (1) that the time of actual receipt was a thing too indefinite to be inquired into. If the matter had been *res integra*, probably I should not have arrived at any such conclusion. But this case does not come before me upon the words "actual receipt." If it had, I might have felt myself in some difficulty. It comes before me on words which have been held to mean the period appointed for receipt, and therefore the difficulty does not arise. Undoubtedly Vice-Chancellor *Malins*, in *Bubb* v. *Padwick* (2), expressed his dissent from *In re Arrowsmith's Trusts* (3), and Vice-Chancellor *Malins* and Vice-Chancellor *Hall* have expressed their dissent from *Johnson* v. *Crook* (4), in which the present Master of the Rolls very elaborately investigated the whole of these cases. If it were necessary for me to express any opinion, I am bound to say that I think *In re Arrowsmith's Trusts* is a perfectly good decision, and I greatly prefer a construction of wills which will give effect to the intention of the testator to one which will defeat it.

I believe that all the earlier cases proceed simply on this inquiry: Is the contingency expressed with definite certainty? If it be, we will give effect to it; if it be not, we will not give effect to it. Lord *Thurlow*, in *Hutchin* v. *Mannington* (5), came to the conclusion that the contingency was too indefinite. The inquiry when a thing might have been done was not one which could be answered satisfactorily. But when the inquiry was of a definite description, he did not hesitate, any more than any other Judge, to direct it, as is apparent from *Faulkner* v. *Hollingsworth* (6), where there was a gift over on the death of the legatee before the estate should have been sold and the purchase-money received by the trustee, and the Lord Chancellor made a declaration that the legatee had died before the contingency, and that the gift over took effect. I think it needless to go through the

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(1) 1 App. Cas. 452.

(2) 13 Ch. D. 517.

(3) 29 L. J. (Ch.) 774; 2 D. F. & J. 474.

(4) 12 Ch. D. 639.

(5) 1 Ves. 366.

(6) Cited 8 Ves. 558.

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earlier authorities, because, having considered them with some attention, it appears clear that that was the principle on which they all proceeded. Lord *O'Hagan*, in *Minors* v. *Battison* (1), expressed that as being the principle on which the cases go. He says (2): "The cases of *Hutchin* v. *Mannington* (3) and *Elwin* v. *Elwin* (4) certainly sustain the conclusion at which I have arrived. In the former, the gift over was defeated because the purpose was, in the words of the Lord Chancellor, 'immeasurable,' because it was 'all too uncertain.' The uncertainty and difficulty of ascertaining the intent which operated in that case exist also in the case before us. In the latter, a different rule was reached, because the intention was declared with a 'definite certainty,' which does not here compel us to an injurious decision."

The sole question, therefore, is, has the testator in the present case expressed his intention with definite certainty? In my judgment he has, even if a literal construction be put on his words. Independently of authority I should have thought it sufficiently distinct, but the cases to which I have referred shew, in my judgment, that the words in this will must have reference to the period appointed for distribution. That is in no way uncertain, and therefore no difficulty exists. That being so, I hold that the event of *John* dying, as he did, before *Robert*, is a death before he has received the money, and consequently that the gift over takes effect. I have taken *John* because he represents a class. I shall make a declaration that *Robert's* share is divisible into sixths, and that one-sixth goes to the Plaintiff, one-sixth to the children of *John*, one-sixth to the children of Mrs. *Watling*, one-sixth to the children of *George*, one-sixth to the children of Mrs. *Gowing*, and the remaining one-sixth to the children of Mrs. *Shearing*.

Solicitors: *Clarke, Woodcock, & Ryland*, agents for *Hartcup & Sons, Bungay; Whites, Renard, & Co.*, agents for *Emerson, Norwich; Walker & Battiscombe.*

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(1) 1 App. Cas. 428.
(2) Ibid. 447.
(3) 1 Ves. 366.
(4) 8 Ves. 547.

W. L. C.

HARLOCK *v.* ASHBERRY.

FRY, J.
1881
June 20.

[1880 H. 0354.]

*Statute of Limitations—Mortgage—Foreclosure Action—"Payment" of Principal or Interest—*3 & 4 *Will.* 4, *c.* 27, *ss.* 2, 24, 40—7 *Will.* 4 & 1 *Vict.* c. 28—37 & 38 *Vict. c.* 57.

20 Ch D 114

A simple foreclosure action is not an action to recover the money secured by the mortgage, but is an action to recover land. Therefore it is within sects. 2 and 24 of the Act 3 & 4 Will. 4, c. 27, and not within sect. 40.

The "last payment of any part of the principal money or interest secured" by a mortgage, mentioned in the Act 7 Will. 4 & 1 Vict. c. 28, may be made by the mortgagor or his agent, or by any person who, as between the mortgagor and the mortgagee, is liable to make any payment to the mortgagee in satisfaction of the mortgage debt.

Therefore, a payment of rent made by a tenant of the mortgaged property to the mortgagee, in consequence of a notice by the mortgagee requiring the rent to be paid to him, within twelve years before the commencement of a foreclosure action, though made without the knowledge of the mortgagor, will keep alive the mortgagee's right to foreclose, although no payment of principal or interest has been made by the mortgagor for more than twelve years before the commencement of the action.

Revd in appl 19 Ch D. 539 CA

ON the 11th of October, 1849, *William Ashberry* executed a mortgage of some freehold and copyhold hereditaments at *Ely* to *William Apsey*, to secure the payment of £500 and interest. The deed provided for the payment of the principal and interest on the 11th of April, 1850. The interest on the mortgage was allowed to fall into arrear. On the 30th of May, 1856, *Apsey* died, having by his will devised all estates vested in him by way of mortgage to *William Harlock* and *William Marshall*, whom he appointed executors and trustees of his will. After his death some payments on account of interest on the mortgage were made by *Ashberry*, the last payment being of a sum of £10 10*s.* in August, 1859. *Ashberry* died on the 27th of December, 1877, having by his will appointed his daughter *Anne Ashberry* his executrix, and devised and bequeathed to her all his property, real and personal. In January, 1878, *Harlock* and *Marshall* gave notice to the tenants of the mortgaged estate that they claimed the estate, and on the 22nd of June, 1878, *Robert Wade*, one of the tenants, in consequence of this notice, paid them £5, a half-year's

SC as to security for the costs of an appeal
19 Ch D. 84. CA

rent of that part of the property which he occupied. He paid his next half-year's rent to *Anne Ashberry*, and afterwards gave up possession of his holding to her.

On the 21st of April, 1880, this action was commenced by *Harlock* and *Marshall* against *Anne Ashberry*, claiming an account of what was due to them on the mortgage for principal, interest, and costs; payment of which should be found due by a day to be appointed by the Court; and, in default of payment, foreclosure of the mortgaged property.

By her statement of defence the Defendant said the payment of rent by *Wade* was inoperative to give or revive any right in favour of the Plaintiffs. And the Defendant said that the Plaintiffs' claim arose much more than twelve years, and in fact more than twenty years, before the institution of the action, and that during that time no principal money or interest had been paid in respect of the mortgage debt, nor had any acknowledgment of the right thereto or to the mortgaged premises been given to the Plaintiffs, or either of them, or to any one on their behalf by *William Ashberry*, or by the Defendant, or by any one on his or her behalf. And the Defendant insisted upon the statute 37 & 38 Vict. c. 57, and all other statutes for the limitation of actions and suits, as a bar to the Plaintiffs' demands.

At the trial the Plaintiffs abandoned their claim to an order for payment of the amount which should be found due to them, and asked only for foreclosure in default of payment of the amount found due.

Cookson, Q.C., and *Whitehorne*, Q.C., for the Plaintiffs:—

This is either an action to recover the land or an action to recover the mortgage money. In either view the Plaintiffs' right is not barred. If it is an action to recover the land it is governed by sects. 2 and 24 of the Act 3 & 4 Will. 4, c. 27, and by the Act 7 Will. 4 & 1 Vict. c. 28. If it is an action to recover the money it is governed by sect. 40 of the former Act; the period of limitation being in both cases reduced by the Act 37 & 38 Vict. c. 57, from twenty to twelve years (1).

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(1) 3 & 4 Will. 4, c. 27, s. 2, provides that no person shall bring an action to recover any land but within twenty years next after the time at which the right to bring such action shall have first accrued to some person

In *Dearman* v. *Wyche* (1) it was held that a foreclosure suit is a suit for the recovery of the mortgage money, and the same view was taken in *Du Vigier* v. *Lee* (2) and in *Sinclair* v. *Jackson* (3); though Lord *St. Leonards* expressed a contrary view in *Wrixon* v. *Vize* (4). In *Chinnery* v. *Evans* (5) it was held that the words in sect. 40, "by the person by whom the same shall be payable, or his agent," apply to the making of a payment as well as to the signing of an acknowledgment. If that section applies, the receipt of rent by the Defendant from *Wade* after his payment to the Plaintiffs amounts to a ratification by the Defendant of that payment, and constitutes it a payment by the Defendant's agent.

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through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to bring such action shall have first accrued to the person bringing the same.

Sect. 24 provides that no person claiming any land in equity shall bring any suit to recover the same "but within the period during which by virtue of the provisions hereinbefore contained," he might have brought an action to recover the same, "if he had been entitled at law to such estate, interest, or right in or to the same, as he shall claim therein in equity."

The Act 7 Will. 4 & 1 Vict. c. 28, provides that "it shall and may be lawful for any person entitled to or claiming under any mortgage of land, . . . to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued."

Sect. 40 of the Act 3 & 4 Will. 4, c. 27, provides that "no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was given."

(1) 9 Sim. 570.

(2) 2 Hare, 326.

(3) 17 Beav. 405.

(4) 3 D. & War. 104, 120.

(5) 11 H. L. C. 115. 10 Jur. N.S. 855

But if the action is one to recover the land, then under the Act 7 Will. 4 & 1 Vict. c. 28, payment of some principal or interest within twenty years (now twelve years) before the commencement of the action is enough to keep alive the right. It is not necessary that the payment should have been made "by the person by whom the same shall be payable or his agent." Probably a payment by a mere stranger would not be a "payment" within the Act, but the payment by *Wade* is sufficient: *Brocklehurst* v. *Jessop* (1); *Ward* v. *Carttar* (2).

North, Q.C., and *H. A. Giffard*, for the Defendant:—

The object of a foreclosure action is to obtain payment of the mortgage money at once, and to disentitle the mortgagor, if he does not pay it at once, from paying it at any future time. Payment is contemplated as following the taking of the account, though it is not an enforced payment, and a term is fixed within which the payment must be made if the Defendant desires not to be deprived of his right to redeem. A Court of Equity regards a mortgage as only a security for the payment of money: *Heath* v. *Pugh* (3); though, no doubt, in that case the Court of Appeal expressed their approval of the view expressed by Lord *St. Leonards* in *Wrixon* v. *Vize* (4), that a foreclosure action is an action to recover land.

If that be so, still the payment by *Wade* is not enough to keep alive the Plaintiffs' right. The Act 7 Will. 4 & 1 Vict. c. 28, must be construed as if it contained the words "by the person by whom the same shall be payable or his agent," which occur in sect. 40 of the former. The periods must be the same for recovering the mortgage money and the land. A payment by a stranger will not satisfy the Act. If the person who pays is not the mortgagor or his agent, he must be a stranger. A stranger might be induced to make the payment by the person who was entitled to receive it. A tenant who pays his rent to the mortgagee does not make the payment as the agent of the mortgagor. *Brocklehurst* v. *Jessop* was commented on unfavourably by Vice-Chancellor *Turner* in

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(1) 7 Sim. 438.

(2) Law Rep. 1 Eq. 29.

(3) 6 Q. B. D. 345.

(4) 3 D. & War. 104, 120.

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Fordham v. *Wallis* (1). A tenant who pays his rent to the mortgagee does so by virtue of the mortgagee's paramount legal title to the land. After the mortgagee has given notice to the tenants to pay their rents to him he becomes liable to the mortgagor for wilful default. If a payment of rent by a tenant to the mortgagee keeps alive the right to foreclose, it must equally keep alive the mortgagor's right to redeem, and a mortgagee could never acquire an absolute title to the land as against the mortgagor. A tenant might at any time after the expiration of the period of limitation voluntarily make a payment to the mortgagee on account of the mortgage debt and thus prevent the statutory bar. A notice by the mortgagee to the tenants to pay their rents to him cannot create an agency for the mortgagor.

FRY, J., after stating the facts, continued:—

The first question is, whether the action, so far as it is a foreclosure action, is within sect. 40 of the statute 3 & 4 Will. 4, c. 27, or, what is the same thing, within sect. 8 of the statute 37 & 38 Vict. c. 57, the only difference between the two sections being in the length of the period of limitation.

If the original claim for the payment of the mortgage debt had been pressed, the action would undoubtedly have fallen within those sections, but, as the Plaintiffs have abandoned the claim for payment, I am bound to consider the action simply as an action for foreclosure. The two claims being really distinct and separate, the Plaintiffs are entitled to abandon a separate and distinct cause of action, or mode of enforcing the same cause of action. In my judgment, an action for simple foreclosure is not an action to recover the sum of money secured by the mortgage, and for this very simple reason, that its object is to cut off the defendant's right of redeeming the land, and the recovery of the money, if it occurs at all, results, not from the object of the action, but from the conditions which the Court imposes on the right of the plaintiff. That was the view taken by Lord *St. Leonards* in *Wrixon* v. *Vize* (2), and it appears to have been also the view of the Court of Appeal in *Heath* v. *Pugh* (3), where

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(1) 10 Hare, 217. // 17 Jur 228

(2) 3 D. & War. 104.

(3) 6 Q. B. D. 345.

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they evidently approved of the decision in *Wrixon* v. *Vize* (1). If it is not within sect. 40 of the Act 3 & 4 Will. 4, c. 27, it appears to me that the action must be within sect. 24, which carries me back to sect. 2 of the same Act. And regard must also be had to the Act 7 Will. 4 & 1 Vict. c. 28. When this action was brought it appears to me that the period limited by sects. 2 and 24 of the Act 3 & 4 Will. 4, c. 27, or the corresponding section of the Act of 1874, had expired. Then arises the question whether the right of action is not saved by a payment made within twelve years next before the action was brought, viz., the 22nd of June, 1878. The whole argument turns upon the question, What is the meaning of the word "payment," because a payment of some sort was made by *Wade* on that day.

It is said by the Defendant's counsel that the payment referred to in the statute 7 Will. 4 & 1 Vict. c. 28 must be a payment made by the mortgagor or his agent, and they ask me to read the language of that Act in exactly the same way as if the words of sect. 40 of the Act 3 & 4 Will. 4, c. 27, had been incorporated with it. I do not, however, feel myself at liberty to depart from the strict language of the later Act, and I observe that Lord *Cranworth*, in *Chinnery* v. *Evans* (2), thought it important to observe that the "statute says nothing as to the person by whom the payment is to be made." At the same time I entirely agree with the argument for the Defendant—in fact the Plaintiffs' counsel did not contend the contrary—that a payment by a mere stranger is not a payment which would keep the right of action alive. I think a payment will keep the right alive if it be made by the mortgagor, or by any agent of the mortgagor, or by any person who, as between the mortgagor and the mortgagee, is liable to make any payment to the mortgagee in satisfaction of the mortgage debt. Suppose, for instance, that the mortgage carried with it as a collateral security a right to receive an annuity payable by a stranger, and that money was received by the mortgagee, it would be extremely difficult to say that the receipt by the mortgagee of the money from the stranger whose payments were pledged as security to the mortgagee was not a "payment" within the meaning of the Act. It is clear he would have to bring such moneys

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(1) 3 D. & War. 104.

(2) 11 H. L. C. 115. 10 Jur 855.

into account as between himself and the mortgagor. What is the effect of a mortgage of land as regards the right of the mortgagee to receive, and (as between the mortgagee and the mortgagor) the liability of the tenant to pay the rent to the mortgagee? In my judgment the mortgage carries with it the liability of the tenant to pay his rent to the mortgagee; the mortgagee may at any time he thinks fit require the tenant to pay his rent to him. Therefore, if I am right in the proposition I have laid down, the tenant whose land is mortgaged is a person who, as between the mortgagor and the mortgagee, is liable to make a payment to the mortgagee in satisfaction of the mortgage debt; and therefore his payment to the mortgagee will keep alive the mortgagee's right to foreclosure. That appears to me to be the good sense of the case, and I hold, therefore, that the payment made by *Wade* did keep alive the mortgagee's right. But, even if this view is not correct, I am strongly inclined to hold in the present case that there is sufficient evidence of ratification and adoption by the Defendant of the payment of rent made by *Wade* to the Plaintiffs to make the payment a payment on her behalf. But the ground I mainly proceed upon is that which I have previously stated. Therefore I give judgment for foreclosure as asked, and the Plaintiffs must add their costs of the action to their security. In taking the accounts, they must of course give credit for the £5 paid to them by *Wade*.

Solicitor for Plaintiffs: *T. H. Bartlett*, agent for *W. Marshall, Ely.*

Solicitors for Defendant: *Gregory, Rowcliffes, & Rawle*, agents for *J. Rogers, Ely.*

W. L. C.

FRY, J.
1881
June 30.

DEARSLY *v.* MIDDLEWEEK.

[1880 M. 1587.]

Costs—Co-Defendants—Contribution.

Where co-defendants are decreed to pay the costs of an action, one co-defendant cannot, by an independent proceeding, obtain contribution in respect of such costs against the other.

JAMES DEARSLY, the Defendant, was tenant, and *Elias Middleweek* under-tenant, of a messuage in *Clapton* from the *London and Suburban Land and Building Company, Limited,* subject to a covenant not to use the same as a beershop. The company obtained an injunction, with costs, against both *Middleweek* and *Dearsly* to restrain the infringement of this covenant.

This was an action by *Dearsly* against *Middleweek* for rescission of the underlease, and *Middleweek* (who had paid all the costs of the action brought by the company) by his defence and counterclaim asked that *Dearsly* might contribute a moiety of the costs of the first action.

J. Pearson, Q.C., and *Hull,* for the Defendant:—

There are precedents for a decree for contribution for costs between co-defendants: *Pitt* v. *Bonner* (1); *Fletcher* v. *Green* (2); *Wilson* v. *Thomson* (3); *Reilly* v. *Lockhart* (4).

North, Q.C., and *Everitt,* for the Plaintiff:—

There is no precedent for such a claim as this.

In *Real and Personal Advance Company* v. *McCarthy,* recently heard before the Court of Appeal, it was said by the Court that no apportionment of or contribution for costs could be obtained by one co-defendant against another in an independent proceeding.

FRY, J.:—

This is an application for which there appears to be no precedent, and I shall not make one. I shall follow the *dictum* which has been cited to me from the Court of Appeal in *Real and Personal Advance Company* v. *McCarthy*, and hold that a defendant cannot proceed against a co-defendant for contribution in respect of costs to which both are equally liable.

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(1) 1 Y. & C. Ch. 670.

(2) 33 Beav. 513.

(3) Law Rep. 20 Eq. 459.

(4) 25 L. J. (Ch.) 697.

Solicitors: *George Brown & Sons; T. W. Rogers.*

C. W. C.

KAY, J.
1881
April 27, 28, 29.

BASTIN v. BIDWELL.

[1880 B. 0797.]

Lessor and Lessee—Renewal of Lease—Performance of Covenants—Condition Precedent.

The lease of a house contained a covenant by the lessee to pay the rent and keep the premises in repair, and to paint the outside and inside at certain fixed periods; and the lessor covenanted that the lessee should be entitled, on giving six months' notice before the end of the term, to have a further lease for twenty-one years "upon paying the rent and performing and observing the covenants" in his lease. The lessee applied for a renewal of his lease, but the lessor refused to grant such renewal, on the ground that the covenants had not been fulfilled either at the date of the six months' notice or at its expiration:—

Held, that the performance of the covenants was a condition precedent to the lessee's privilege of having a renewed lease, and, the requisite painting and repairs not having been completed either when the six months' notice was given or when it expired, the lessee was not entitled to a renewal of his lease.

BY an indenture of lease, dated the 14th of May, 1873, certain premises in *Kingsland Road* were demised by *Thomas Elkington*, who held a lease thereof for eighty years from the Governors of *St. Bartholomew's Hospital*, to the Defendants, *Susan Bidwell, James Bidwell*, and *Arthur Bidwell*, for seven years from the 25th of March, 1873, at a rent of £190, and the lease contained the following covenants:—

"And the said lessor doth hereby for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree to and with the said lessees, their executors, administrators, or assigns, that they the said lessees, their executors, administrators, or assigns, paying the said yearly rent hereby reserved at the times hereinbefore appointed for payment thereof and performing and keeping the several covenants and agreements herein contained and on their parts to be done and performed and kept, shall peaceably and quietly have, hold, occupy, possess, and enjoy the said messuage and tenement and premises hereby demised for and during the term hereby granted without the let, suit, trouble, denial, or interruption of, from, or by the said lessor, his executors, administrators, or assigns, or any other person or persons whomsoever lawfully claiming or to claim by, from, or under him, them, or any of them, or by, through, or in consequence of his or their neglect or default, means, privity, or procurement. And further, that the said lessees, their executors, administrators, or assigns, shall be entitled, on giving six months' notice before the expiration of the said term of seven years, to have a further lease of the said premises for a term of twenty-one years from expiration of the said term of seven years, at the annual rent of £200, upon the lessees paying the rent and performing and observing the covenants of this present lease, the said further or renewed lease to contain covenants, provisions, and conditions similar to those contained in this present lease, and to be granted upon the condition that the said lessees, their executors, administrators, or assigns, pay the cost of preparing such lease and counterpart, but it shall not contain a provision for any further renewal of the said term."

And the lessees covenanted with the lessor to paint all the outside wood- and iron-work which was usually painted twice over on or before the 24th of June, 1875, and in like manner, once in every third year of the term, the inside wood- and iron-work, which was usually painted, on or before the 24th of June, 1879, and also that they, at their own costs during the term, as often as occasion should require, would well and sufficiently keep the demised premises and appurtenances, as well externally as internally, with all needful and necessary reparations and amendments whatsoever, and at the end or sooner determination of the term yield up to the lessor the same premises whole, safe, and undefaced. And the lease contained a proviso for re-entry on non-payment of rent or non-performance of the covenants.

By an indenture of assignment dated the 24th of March, 1875, the Defendants assigned to the Plaintiff the said messuages and premises for the residue of their term of seven years, at the rent and subject to the covenants by the lessee and conditions in the lease reserved and contained, and thenceforth to be paid, performed, and observed.

In March, 1875, *Thomas Elkington* mortgaged the premises comprised in the aforesaid lease and the term of eighty years to *J. W. Browne*, to secure the repayment of £1200 and interest;

and on the 25th of March, 1875, the Defendants purchased from *Thomas Elkington* his equity of redemption in the mortgaged premises for £2300, and the mortgage had since been paid off by the Defendants.

On the 25th of September, 1879, the Plaintiff gave notice to the Defendants of his intention and desire that his lease should be renewed for twenty-one years, in accordance with the covenant contained in the lease of May, 1873, but the Defendants refused to grant such further lease to the Plaintiff, and they threatened to prevent the Plaintiff from remaining in possession of the premises. The Plaintiff alleged that he had duly paid the rent and had performed and observed the covenants in the lease of May, 1873, and he now claimed specific performance by the Defendants of the covenant by the said *Thomas Elkington* contained in the lease of May, 1873, to grant a further lease of the premises for twenty-one years from the expiration of the term of seven years thereby granted, at the annual rent of £200, and he claimed an injunction to restrain the Defendants from disturbing him in the possession of the premises; and the Plaintiff also claimed damages.

The Defendants denied that the Plaintiff had duly paid the rent and performed and observed the covenants contained in the lease of the 14th of May, 1873, and in particular they alleged that the Plaintiff had not painted, cleansed, and repaired and kept in repair the said premises in accordance with the covenants contained therein, and that the premises were at the time when the further lease was required, and still were, out of repair. The Defendants further alleged that it was a condition precedent to granting any further or renewed lease that the Plaintiff should have observed and performed all the covenants in the said indenture of lease.

Witnesses were examined, and the evidence was contradictory as to when the rent was paid and when the repairs were effected. There was rent due when the six months' notice was given for renewal, but it was paid before the expiration of the notice, and there were repairs wanted which were not completed when the notice expired.

Higgins, Q.C., and *Leeke*, for the Plaintiff:—

Our contention is that we are absolutely entitled to have a

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renewal of our lease, under the terms of the covenant, and that there is no condition precedent. The words are that the lessees shall be entitled, on giving six months' notice before the expiration of the terms of seven years, to have a further lease for twenty-one years, at an annual rent of £200, upon the lessees paying the rent and performing and observing the covenants in the lease. The covenants in this lease have been substantially performed, and it was sufficient that they should have been performed before the expiration of the first term. In such a covenant as this, it is not necessary that the tenants should have strictly observed and performed the covenants all through the lease, as Lord Justice *Mellish* said in *Finch* v. *Underwood* (1). It is sufficient that they should have been performed; and if the repairs were not completed when the notice of renewal was given, that was waived by the subsequent acceptance of rent. In the case of *Hays* v. *Bickerstaffe* (2), it was held that the words "paying the rent and performing the covenants" did not constitute a condition precedent, and there was a similar decision in *Dawson* v. *Dyer* (3). In *Warren* v. *Asters* (4), words making reciprocal covenants were held not to constitute a condition; and in *Hare* v. *Burges* (5), under a covenant to renew a lease, there being no clause of re-entry, it was held that the lessor could not refuse to renew upon the ground of breach of covenant, unless there had been a gross and wilful breach.

This case is not governed by the decision in *Finch* v. *Underwood*, for there all the covenants were to have been performed. Non-performance of a covenant to repair must mean neglect to repair after notice given to the tenant to do it. In case of any breach of the covenants, the landlord had a right of re-entry, which was sufficient to ensure performance of the ordinary covenants in the lease, and a tenant must always have a reasonable time allowed him for completing repairs. There was no ground in this case for an action for damages, because any notice to repair would at once have been complied with, and the damages would have been merely nominal: here there was no notice to repair, and

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(1) 2 Ch. D. 310.

(2) 2 Mod. 34.

(3) 5 B. & Ad. 584.

(4) Sir T. Jones, 205.

(5) 5 W. R. 585. 4 Jur. N.S. 1295

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there were no substantial repairs required. If no notice is given, it must be taken that the landlord acquiesces in the breach of covenant or waives any special repairs, and after that he cannot take advantage of that acquiescence, and say that in consequence of some trifling repairs not having been performed, he will not perform his covenant to renew.

[Upon the subject of waiver by receipt of rent, they cited *Walrond* v. *Hawkins* (1) and *Dendy* v. *Nicholl* (2), and, upon the equitable doctrine of acquiescence, *Bankart* v. *Tennant* (3); and, where money had been expended upon the faith of a promise to renew, *Ramsden* v. *Dyson* (4).]

Marriott, Q.C., *Millar*, Q.C., and *Boome*, for the Defendant:—

The words of this covenant must mean that the landlord was not bound to grant a lease unless the conditions had been performed; and this view of the case is upheld by many decisions. *Finch* v. *Underwood* (5) leaves no room for doubt, because there the words were, "in case the covenants should have been performed;" and the Lords Justices not only decided that there was a condition precedent, but that the repairs, however slight, must have been duly performed, and must have been completed when the renewal was applied for. A renewal of a lease, said Lord Justice *James*, is a privilege to which the tenant is entitled upon certain conditions, namely, that he shall have performed all the covenants on his part.

In *Davis* v. *Thomas* (6), where there was an agreement that the tenant should be at liberty to purchase the premises in case he regularly paid his rent, it was held that this was a privilege which the tenant was not entitled to if the money was not paid accordingly; and in *Job* v. *Banister* (7) a landlord was held to be at liberty to refuse a renewal if the covenants were broken. The tenant must shew that he has fulfilled the conditions upon which alone the right to renewal arises.

[They also cited *Walker* v. *Jeffreys* (8) and *Wood* v. *Day* (9).]

(1) Law Rep. 10 C. P. 342.
(2) 4 C. B. (N.S.) 376.
(3) Law Rep. 10 Eq. 141.
(4) Ibid. 1 H. L. 129.
(5) 2 Ch. D. 310.
(6) 1 Russ. & My. 506.
(7) 2 K. & J. 374.
(8) 1 Hare, 341.
(9) 1 J. B. Mo. 389, cited in *Platt* on Covenants, p. 290.

In this case there was rent due at the time the notice to renew was given, though it was subsequently paid, and there were repairs and painting required, which were not even completed at the time the term of seven years expired. Therefore, there was a clear breach of covenant, which justified the Defendant's refusal to renew.

Higgins, in reply.

KAY, J.:—

The action in this case is for specific performance by the Defendants of a covenant contained in a lease of the 14th of May, 1873, for renewal of the lease from the expiration of the original term of seven years, and for an additional term of twenty-one years. [His Lordship read the terms of the covenants in the lease.] That lease being dated on the 14th of May, 1873, the Defendants, who were the lessees, assigned their interest in the lease on the 24th of March, 1875, to the Plaintiff *Bastin*, and on the 25th of March, 1875, the Defendants bought the interest of their lessor, which was an original term of eighty years subject to a mortgage, which was paid off by them. Under the covenant in the lease, the 24th of June, 1875, was the day upon which the outside painting was first to be done, and then every three years after that. It appears, according to the evidence, that some time in 1875 the warehouse was painted outside, but the rest of the building, which consisted, I believe, of a dwelling-house, was not painted in 1875 at all, but was painted outside some time in 1876. The next time for painting the outside would be the 25th of June, 1878, but there was no outside painting done at all in 1878 or subsequently. On the 24th of June, 1879, the inside painting was to be done according to the covenant; on the 25th of September, 1879, a notice for renewal was given, being a six months' notice, which would expire on the 25th of March, 1880, which would be the end of the seven years' term. At the time that notice was given there were undoubtedly breaches of both these covenants to paint. There was also, according to the evidence, a sum of money, the amount of which is not exactly fixed, due for rent. It is said that £34 8*s.* 9*d.* was due for rent and insurance, which ought to have been paid on the 24th of June, 1879. In January, 1880, a quarter's rent was paid, due in September, 1879, and some time in 1880, which is not exactly fixed, but which is, according to the Plaintiff's evidence, in January, February, or March, he began to paint the premises inside. According to the Defendant's evidence that was not commenced until June. I think it is quite plain, according to the evidence on either side, that the painting was not completed by the 25th of March, so that there was a breach of covenant as to the inside painting at the time when the notice expired on the 25th of March, 1880. As to the outside painting, as I have said, there was an undoubted breach at the same time, because it ought to have been done in 1878, and was not done at all.

In this state of things the first question I have to consider is, what is the meaning of this covenant to renew? Is it subject to a condition precedent or not? Certain cases have been cited to me, and I have read them with all the attention I am capable of. I do not think I got very much assistance in determining that question of construction from the cases that have been reported.

The first one is a case which was not cited, but is the first I have been able to find. It is the case of *Simpson* v. *Titterell* (1), which was decided in 1589. There the material words were, Proviso *semper* against an assignment by the lessee except to the lessor, and it was held that that was a good condition. It was said there that the word "proviso" always implies a condition. That must be taken with some qualification, because upon reference to *Bacon's* Abridgment "Covenant A" (2), it will be found that whether "proviso" implies a condition or not must of course depend on the context; sometimes it is a mere explanation, sometimes it is an exception.

The next was a case decided in the year 1589, and it was upon a covenant in a lease for quiet enjoyment, and the words were "the lessee paying the rent." Two Judges decided it. One determined that those words "paying the rent" were words of condition; the other Judge dissented. That is an anonymous case, reported in *Leonard* (3).

Then the next case was decided in 1674—the case of *Hays* v.

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(1) Cro. Eliz. 242.

(2) Page 340.

(3) Vol. iv. p. 50.

Bickerstaffe (1). That, again, was a covenant for quiet enjoyment in a lease worded thus: "The lessee paying the rent and performing the covenants," and it was held those words "paying the rent and performing the covenants" were not conditional words. I confess that I have some difficulty about this case, for this reason: If they were not conditional words, what was the effect of them? The lessee had previously entered into certain covenants in that lease, and if those words were merely a repetition of the covenants, then it seems to me they had no effect whatever. However, that was the decision, and it is a decision inconsistent with the anonymous case in *Leonard* which I have referred to.

The next case to which I refer is *Boone* v. *Eyre*, reported in a note to *Henry Blackstone* (2). *Boone* v. *Eyre* was with reference to a covenant in a deed, whereby the plaintiff conveyed to the defendant the equity of redemption of a plantation in the *West Indies*, together with the stock of negroes upon it, in consideration of £500 and an annuity of £160 for his life, and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and that the defendant should quietly enjoy. He covenanted that the plaintiff well and truly performing all and everything therein contained on his part to be performed, he, the defendant, would pay the annuity. The breach alleged was the non-payment of the annuity. Plea, that the plaintiff was not, at the time of making the deed, legally possessed of the negroes on the plantation, and so had not a good title to convey, to which there was a general demurrer. Lord *Mansfield* said: "The distinction is very clear. Where mutual covenants go to the whole of the consideration on both sides they are mutual conditions, the one precedent to the other, but where they go only to a part—where a breach may be paid for in damages—there the defendant has a remedy on his covenant and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action." That is a decision of very great authority, being constantly quoted, and undoubtedly is a leading case. Perhaps it is not a very fortunate use of language to say, "Where covenants go to the whole consideration on both sides;" but the meaning is very clear. If a covenant of this kind could be held to be a condition, then the non-possession of any one negro upon this estate would deprive the man of the whole of his annuity, and, looking to the scheme of the deed and the contract between the parties, it is impossible to come to this conclusion. That forms a very good ground of construction of deeds and provisions of this kind, namely, that you are not bound and fettered by the precise words, but are to look fairly and reasonably at the whole scheme of the deed. That case is reported in a note to the report of the case of the *Duke of St. Albans* v. *Shore*, in *Henry Blackstone* (1), and in that case of the *Duke of St. Albans* v. *Shore* the marginal note is this: "Where in articles of agreement under a penalty there are mutual covenants between *A.* and *B.* to do certain acts, and also a covenant which goes to the whole consideration on each side, to an action of debt for the penalty brought by *A.* against *B.* on account of the non-performance of his part, *B.* may plead in bar a breach by *A.* of the covenant which goes to the whole consideration. So that where in articles of agreement for the sale of lands it was agreed that *A.*, the seller, should take in part of payment a conveyance of other lands belonging to *B.*, the buyer, and it was also agreed that all timber trees then upon any of the estates should be valued by appraisers and paid for by the respective purchasers at a given time; to an action of debt by *A.* against *B.* for the penalty on his refusal to complete the purchase, *B.* may plead that *A.* before the time cut down a certain number of trees, and thereby rendered himself unable to perform, and it was impossible for him to perform, the agreement. To entitle himself to the penalty the plaintiff must shew a strict performance on his part." Lord *Loughborough* in that case says (2), "This is not an action of covenant where one party has performed his part, but is brought for a penalty on the other party refusing to execute a contract; but to entitle the party bringing the action to a penalty, he ought punctually, exactly, and literally to complete his part. We are therefore of opinion that the plea is a good bar to the action."

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(1) 2 Mod. 34.

(2) Vol. i. p. 273.

The next case to which I refer is that of *Porter* v. *Shephard* (3).

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(1) Vol. i. p. 270.

(2) Vol. i. p. 279.

(3) 6 T. R. 665.

That was the case of a lease, and the marginal note is, "In a lease for seven years, containing the usual covenants that the lessee should pay the rent, keep the premises in repair, &c., there was a proviso that the lessee might determine the term at the end of the first three or five years, giving six months' previous notice, and that then, from and after expiration of such notice and payment of all rents and duties to be paid by the lessee, and performance of all his covenants until the end of the three or five years, the indenture should cease and be utterly void." In that case it was held by Lord *Kenyon*, Mr. Justice *Ashurst*, and Mr. Justice *Lawrence*, that the payment of the rent and performance of the other covenants were conditions precedent to the lessees determining the term, and that his merely giving six months' notice was not sufficient.

The next case in order of date is *Davis* v. *Thomas* (1). That was in 1831. There there was a right of pre-emption, and the words were in case the plaintiff regularly paid rent on certain days mentioned, but if default were made in payment within the stated periods the agreement should be void, and there the distinction was taken between a privilege, and it was said he was to have a privilege in case he did certain things, and that the proper construction was that it must be strictly performed.

Then the next case in order is *Dawson* v. *Dyer* (2). That was a covenant for quiet enjoyment in a lease, and the words were "paying rent and performing the covenants." It was held that those words did not make a condition precedent; but it seems to have been intimated that it would have been otherwise if there had been words by way of proviso.

Then comes a case of *Stavers* v. *Curling* (3), which was not a case of lease. It seems rather to follow *Boone* v. *Eyre* (4). It was a case where the plaintiff, as the captain of a *South Sea* whaler, covenanted with the defendants that he would proceed to the fishery and procure a cargo of sperm oil, or as great a proportion as might be under all circumstances within his power to obtain; would return to *London* and at his own cost deliver the cargo; would obey instructions; be frugal of provisions and not dispose of any of them without accounting for the same, and would not smuggle or trade or permit any on board to do so. The defendants covenanted, on the performance of the before-mentioned terms and conditions on the part of the plaintiff, to pay him a certain proportion of the net proceeds of the cargo.

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(1) 1 Russ. & My. 506.

(2) 5 B. & Ad. 584.

(3) 3 Bing. N. C. 355.

(4) 1 H. Bl. 273.

It was held that they were covenants, and independent, and that "on the performance" did not imply a condition, and for the reason, that if they did, any omission to perform any of the small covenants on the part of the plaintiff would disentitle him to the whole of his profit. That was precisely the *ratio decidendi* in *Boone* v. *Eyre* (1), and I cite the case because the words there were as like the words in this case as any I have found.

Then came a case which was very much considered, the case of *Grey* v. *Friar*, which, after being determined first of all in the Court of Exchequer, who held that there was not a condition precedent, went to the Court of Exchequer Chamber, who held that there was a condition precedent, and then went to the House of Lords, who summoned eleven Judges, eight of whom held that the Court of Exchequer Chamber was right, and the other three that the Court of Exchequer was right, and the two Lords—Lord *St. Leonards* and the Lord Chancellor, Lord *Cranworth*—were divided in opinion, and therefore the judgment of the Court of Exchequer Chamber was affirmed (2).

That was a case of a lease, and the proviso was that if the lessee should give eighteen months' notice to quit at the end of eighteen years, then, all the arrears of rent being paid and all and singular the covenants and agreements on the part of the lessee having been duly observed and performed, the lease should be void; but there was this clause added, "but nevertheless without prejudice to any claim or remedy which any of the parties hereto, or their respective representatives, may then be entitled to for breach of any of the covenants and conditions hereinbefore contained." The Lord Chancellor, in giving judgment, intimated that his very strong conviction was that the original judgment of the Court of Exchequer, that the proviso did not make the covenant a condition precedent, was right, but the ultimate decision was that it was a condition precedent.

(1) 1 H. Bl. 273.

(2) 4 H. L. C. 565.

Then there comes the case of *Job* v. *Banister* (1), where there was a covenant to renew, provided the rents should have been paid and the covenants kept, it was held, consistently with all the cases, that that was a condition precedent. Of course, I have not referred to numbers of cases I could find, but I have taken out those which seemed to me the more valuable for the present purpose. That brings me down to the case of *Finch* v. *Underwood* (2). The marginal note is, "A lease was granted to two, with a proviso for re-entry in case the rent should be in arrear for thirty days, or the tenants or either of them should become bankrupt, or let, assign, or part with the premises, or any part thereof, without license; or if the tenants should not keep the covenants (which were joint and several covenants), one of which was to keep the interior of the property in repair. The landlord covenanted that he would at the expiration of the term (in case the covenants on the tenants' part should have been duly performed), grant to 'the tenants, their executors and administrators,' a fresh lease." It appears that the covenants had not been duly performed, but that the landlord had gone on receiving rent with full notice of the circumstances, and it was argued that this amounted to a waiver. Lord Justice *Mellish* answered that argument in this way (3): "Receipt of rent waives a forfeiture" (that is, of course, the right of re-entry under a power to re-enter), "because it admits the lease to be subsisting, but does it follow from that that a condition precedent to granting a new lease is waived?" I confess upon consideration that satisfies my mind completely. Supposing there was a waiver of the right of re-entry, it does not seem to me at all to follow that the precedent condition would be waived or affected in the least degree. The condition precedent is this: If you have performed your covenants altogether, then, that being the precedent condition, you shall be entitled to have the renewed lease; if you have not performed your covenants it does not matter that the lessor may have waived his right of forfeiting the lease; the condition precedent has not been performed, and if the precedent condition has not been performed, the right which depends upon it does not arise at all. This case decided two other points, which were these: It decided that the language used in that particular case did amount to a condition precedent, that the covenants and agreements must have been duly observed and performed as a condition precedent to the tenant having a right to obtain a lease, which was said, no doubt with reference to that case of *Davis* v. *Thomas* (1), by Lord Justice *James*, to be a privilege to which the tenant was to be entitled upon his doing certain things. The other point decided by that case was, that you must look at the state of things at the time when the notice to renew was given. The question for the Court to consider in determining whether the precedent condition had been fulfilled or not was this, to use the words of Lord Justice *Mellish* (2), "What does that mean? I think it does not mean that the tenants must have strictly observed and performed the covenants all through the term, for the expression is, 'shall have been duly observed and performed,' and I think that this is satisfied if they have been so observed and performed that there is no existing right of action under them at the time when the lease is applied for." That must mean, I suppose, at the time when the notice is given.

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(1) 2 K. & J. 374; and on appeal, 5 W. R. 177. (2) 2 Ch. D. 310.
(3) 2 Ch. D. 314.

3Jun 28-93.

I think I was justified in saying these cases do not very clearly enable me to decide what the meaning of this particular covenant is, and I must, with the light they give me, decide for myself what the meaning of this covenant is; the first question being whether it amounts to a precedent condition or not.

First of all looking to the scheme of the whole thing, it is apparent that what is granted to the tenant by this covenant is a privilege. He is to be entitled to renew, that is in every sense a privilege. I do not think the cases of *Boone* v. *Eyre* (3) and *Stavers* v. *Curling* (4) affect the matter at all. To use the technical language in *Boone* v. *Eyre,* this is a matter which goes to the whole consideration. It is obvious the meaning was this: the landlord must have intended by a covenant worded like this to say: "I shall have the term in which to see whether you are such a tenant as I shall think it right and expedient to grant a new lease to, and the test I propose in words is this, whether when you come for your new lease, or whether at some time or other (I will not

(1) 1 Russ. & My. 506.

(2) 2 Ch. D. 315.

(3) 1 H. Bl. 273.

(4) 3 Bing. N. C. 355.

at the present moment say what time) you have paid your rent and performed your covenants." I am not able to see, looking at the scheme of the whole lease, how these can be anything but words of condition. Then I look at it grammatically, and I find the words to be these, "And further, the lessees shall be entitled, on giving six months' notice before the expiration of the term, to have a further lease of twenty-one years at a certain rent, upon the lessees paying the rent and performing and observing the covenants." I put to Mr. *Leeke*, who argued this case extremely well, this point, Is it possible to deny that the giving of six months' notice was a precedent condition? Of course he was bound to admit that must be a precedent condition. But then the very same phraseology is used with respect to the covenants. It is upon performing the covenants; and looking at it grammatically, if "on giving six months' notice" are words in which a condition is expressed, why should not "upon performing covenants" similarly express a condition? Grammatically, I think that construction is one which is a fair construction of this clause. Therefore, upon the whole, looking to the intention of the parties, and looking to the grammatical construction of the clause, I think, construing this, as I quite agree every Court is bound to construe such a provision, with regard to the whole lease and to the meaning and intention of the parties to be gathered from every part of it, it is a condition and not a covenant. And I am the more led to that conclusion, because if it is not a condition the question arises—What is it? "Upon the lessees performing the covenants." If it is not a condition it must be a covenant. Why should there be a covenant that the lessee should perform the covenants? It seems to me that to say it is not a condition but a covenant, is really depriving the words of any meaning whatever. I have therefore come to the conclusion, having given it the best consideration I am able, that these are words of condition.

But then it was very properly asked, if they are words of condition what do they mean? What is the condition? Do these words mean that the covenants are to be performed before the notice given or before what time? I observe the words are very different indeed from the words in *Finch* v. *Underwood* (1), and the difference is such as to give rise very fairly to that argument. The words in *Finch* v. *Underwood* (1) were, "The covenants having been performed"—which seems to point to the time when the notice was given. There are no words of that kind here. The words are "upon the lessees paying the rent and performing and observing the covenants," and it was argued very plausibly, and I have given all the weight possible to that argument, that that may fairly mean, they are to give notice to renew, and if there is existing any breach of covenant, at the time of the notice, it will be quite sufficient if they repair that breach of covenant within the six months. The argument was of course limited to that because it would be extravagant to say they might have any time beyond the six months they chose for repairing the breaches of covenant.

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(1) 2 Ch. D. 310.

There are two observations to be made upon that argument: one is this, that in truth if there was a breach of covenant at the time the notice was given, to repair that breach of covenant afterwards is not in strict language performing a covenant, it is making good a breach of the covenant. Take this very case. The premises should have been painted outside in the year 1878. They were not painted outside in the year 1878; and they were not painted outside when the notice was given. Therefore, supposing they had been painted outside after the notice was given, and before the expiration of the six months, that painting outside could hardly in strict legal language be said to be a performance of the covenant. It would be in strict legal language a reparation of the breach. In popular language, and it may possibly be that those words are to be so construed, it would be a performance of the covenant, and some weight may be given to the argument from the language I have just read in Lord Justice *Mellish's* judgment when he said the covenants are satisfied although there may be breaches of covenant during the lease if at the time the notice is given those breaches had been repaired and there is no existing breach. So that it may be a plausible argument, and it is one to which I have given attention. The meaning of those words may be, not that there was to be no existing breach of covenant at the time the notice was given, but that if during the six months before that notice expired the lessee did repair any existing breach of covenant, so that at the end of the six months there was nothing upon which he could be sued for a breach of covenant—no existing breach of covenant, he might be then entitled to his lease. I have considerable difficulty in determining which of these two constructions should be preferred, that is, whether this clause means that there should be no breach at the time the notice was given, or that there should be no breach at the time that the notice expired; but I purposely avoid determining it because in this case it is quite immaterial. At both dates there were breaches of the two covenants to paint. The covenant to paint inside had not, according to this evidence, been fully performed when the six months' notice expired, and the covenant to paint outside, which should have been done in 1878, had not even been begun to be performed. Therefore I am relieved from deciding that point, and I do not desire to say any more upon it.

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(1) 2 Ch. D. 310.

The result is that according to my judgment there is in this case a precedent condition that the covenants should be observed before the lessee is entitled to have a renewed lease, and upon the evidence I must hold that that precedent condition has not been fulfilled, and therefore the lessee never has become entitled to the renewed lease, and I must dismiss the action with costs.

Higgins, Q.C., adverted to a question which had been raised by the Defendants as to a breach of covenant by the erection of a staircase by the Plaintiffs without license from the Defendants, but which turned out to be unfounded, since the license, if any, which was requisite, was a license from the superior landlords—the Governors of *St. Bartholomew's Hospital*—and no evidence had been given that they did not consent. He therefore asked that the Court would apportion these costs and order them to be paid by the Defendants. If the apportionment was effected by the Taxing Master it would lead to considerable expense. In one case the Court of Appeal, under similar circumstances, had given half costs; and in a case before Mr. Justice *Fry* a quarter of the costs had been deducted.

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KAY, J.:—I cannot do so unless by consent. If the parties will agree that it shall be quarter costs, I will make an order to that effect.

Marriott, Q.C., for the Defendants, said he would leave it to the Court to say what would be right to allow.

KAY, J.:—Then I say a quarter of the costs to be deducted in respect of the question about the staircase. That will entitle the Defendants to three-quarter costs, and I fix one month as the time for the Plaintiff to give up possession.

Solicitors: *Dawes & Sons; Roscoe, Hinks, & Sheppard.*

T. W. G.

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[1880 B. 167.]

Mortgage of Ship—Sale by First Mortgagee—Claim for an Account by Second Mortgagee—Statute of Limitations—Express and Constructive Trust.

The second mortgagee of a ship claimed an account against the first mortgagee, who had sold the vessel upon the mortgagor becoming bankrupt. Defendant offered to pay a specific amount. The action having been commenced more than six years after the sale, the Defendant pleaded the *Statute of Limitations*. The Plaintiff set up an express trust as a bar to the statute:—

Held, that there was no express trust; that in case of an ascertained surplus the first mortgagee might be constructively a trustee of the surplus, but after six years, evidence could not be adduced to prove a surplus:—

But *held*, that although the statute was not avoided on the ground of express trust, it was in this case avoided by an acknowledgment within six years of an unsettled account pending, which by itself would have sufficed, and also by a promise to pay what should be found due. The Plaintiff was therefore entitled to an account.

Where the mortgagee of his own mere motion realized the mortgaged property, he was held not to be entitled to interest in lieu of notice.

An express trust bars the statute equally as to personalty and realty by force of the *Judicature Act*, 1873, s. 25, sub-s. 2.

ON the 7th of January, 1873, *John Lacy* mortgaged a steamship, called the *Georgian*, to the Defendant, *R. Berridge*, in the statutory form, for £18,000, as well as sums previously advanced to *Lacy*. On the 5th of February, 1873, *J. Lacy* executed a second mortgage of the same ship to *Haldenby & Keyworth* to secure the balance of an account due to them. On the 2nd of September, 1873, *J. Lacy* became insolvent, and his affairs were liquidated by arrangement, and the Defendant *A. W. Chalmers* was appointed his trustee in liquidation. On the 2nd of September, 1873, *Haldenby & Keyworth* became insolvent, and *H. W. Banner* (now represented by the Plaintiff, *J. S. Banner*) was appointed trustee of the liquidation. In November, 1873, the Defendant *Berridge* seized the *Georgian* at *Antwerp*, and she was brought to *England* and sold by the Defendant's agent, *J. Preston*, on the 10th of December, 1873, for £18,500; and a further sum of £839 was received by the Defendant for freight earned by the vessel, and a sum of £95 was paid to the Defendant as balance of the captain's account; a deposit of £1850 was paid when the sale was effected, and the balance in January, 1874. The Defendant had since realized other securities held by him upon two other ships, called the *Retriever* and *Circassian*, in exercise of his rights as mortgagee. The Plaintiff, as trustee in liquidation of the second mortgagee, alleged that a considerable sum was due to him on the second mortgage, and that the Defendant sought improperly to charge six months' interest in lieu of notice in respect of his security on the *Georgian* and also on the *Retriever*. This action was commenced on the 8th of March, 1880, and the Plaintiff claimed that an account might be taken of what was due to the Defendant *Berridge*, and that he might be ordered to pay the remainder of the money in his hands to the Plaintiff. The Defendant *Berridge* by his answer stated that in August, 1874, he had rendered an account to the Plaintiff of the moneys received by and due to him on account of the sale of the ship *Georgian*, and that account shewed that a sum of £329 remained in his hands after payment of the sums due to him, and that amount he had always been ready and willing to pay to the Plaintiff, but the Plaintiff refused to receive the same. The Defendant had paid the £329 into Court, and he claimed the benefit of the *Statute of Limitations* as a defence to this action. The Defendant stated that he had never claimed the sum of £839 mentioned in the claim, nor the other sum of £95, and that he had frequently so informed the Plaintiff.

Rigby, Q.C., and *Warmington*, for the Plaintiff:—

The defence set up to our claim is substantially the *Statute of Limitations.* Such a defence cannot avail the Defendant, because in this case the sale of the ship was effected under the *Merchant Shipping Act* (17 & 18 Vict. c. 104), and by the 71st section of the Act it is provided that where there are more mortgages than one, the sale shall not be effected without the consent of the prior mortgagees, shewing clearly that the mortgagee who sells does so in that case, and therefore in any case, for the benefit of the rest, and thereby becomes a fiduciary agent. The first mortgagee consequently was a fiduciary vendor. He was in the position of a trustee against whom the statute would not run. He may be charged for what he ought to have received, and for wilful default. It has always been the practice to charge the mortgagee who sells upon that principle. It was held in *Tanner* v. *Heard* (1) that a first mortgagee who sold with the consent of the second mortgagee was accountable to the second mortgagee in the character of a trustee, and it was decided in *Kirkwood* v. *Thompson* (2) that the circumstance of the mortgage being in the form of a trust for sale makes no difference. There was in this case an express trust as to the money produced by the sale in the same way as in the case of any ordinary mortgagee selling under the powers of a common mortgage. There is here a distinct allegation and admission of a surplus, and this brings the case within *Locking* v. *Parker* (3), where the principle was to that extent admitted at page 40; and in the case of *In re Alison* (4), Lord Justice *Baggallay*, in commenting upon *Locking* v. *Parker* (5), quotes the passage found in that case, "that if there had been any allegation in the bill, or any evidence that there were any surplus moneys, the bill might have been sustained for those surplus moneys." The case itself, however, was decided upon a different question, because there the sale of the mortgaged property did not take place until after the estate had been barred under the statute. The case of *Kemp* v. *Westbrook* (6) decides that a bill will lie by the assignee of a bankrupt for an account and delivery of goods pledged by the bankrupt, notwithstanding the *Statute of Limitations. Burdick* v. *Garrick* (1) is also an authority that an agent who stands in a fiduciary relation to his principal cannot set up the *Statute of Limitations* in bar of a suit for an account by his principal. This Defendant is at any rate so far an agent as to be chargeable with interest. *Wilson* v. *Tooker* (2) is also a case in our favour.

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(1) 23 Beav. 555. 7 Jur. N.S. 426
(2) 2 D. J. & S. 613. 11 Jur. N.S. 385
(3) Law Rep. 8 Ch. 30, 40.
(4) 11 Ch. D. 284.
(5) Ibid. 298.
(6) 1 Ves. Sen. 278.

Then we further allege that the Defendant has already admitted his liability to account; he sets out in a letter of the 28th of August, 1874, that all necessary vouchers are at our order for examination. He admits a surplus of £329, but he does not consider that a final settlement until the accounts have been examined. This is exactly within the case of *Prance* v. *Sympson* (3), where it was held that to prevent the right to have an account from being barred by the *Statute of Limitations*, it was not necessary to have an acknowledgment that a debt was actually due, but it was sufficient that there should be an acknowledgment that the account was pending, and from that the Vice-Chancellor inferred a promise to pay the balance if it should be found to be against the accounting party. The Defendant, by submitting to account, necessarily submits to pay what is due from him, and as to what expressions have been held sufficient acknowledgment of debt, we have the cases of *Colledge* v. *Horn* (4), *Skeet* v. *Lindsay* (5), *Mitchell's Claim* (6), and *Quincey* v. *Sharp* (7).

Then we object to a claim raised by the Defendant to a sum of money by way of interest on his mortgage money for six months, in lieu of notice. Interest means a payment for the use of money, and not a bonus for want of notice. He cannot have interest upon money which has been paid. The Defendant took upon himself to sell the ship. There was no opportunity to give notice, and the money was received immediately after the half-year's interest would have become due, and the deposit was paid a month before the purchase-money. The Defendant cannot sustain his claim to interest in lieu of notice except by express contract, and here there is no such contract.

18 Aug 29

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(1) Law Rep. 5 Ch. 233.

(2) 5 Bro. P. C. 193.

(3) Kay, 678.

(4) 3 Bing. 119.

(5) 2 Ex. D. 314.

(6) Law Rep. 6 Ch. 822.

(7) 1 Ex. D. 72.

Higgins, Q.C., and *Northmore Lawrence*, for the Defendant:—

Our first defence to this claim is that the *Statute of Limitations* is a bar to the action. It has been argued that there is an express trust which takes the case out of the statute; but this is not an express trust, but only a constructive trust, which does not prevent the statute being a bar. The distinction is clearly shewn in the cases of *Beckford* v. *Wade* (1) and *Petre* v. *Petre* (2). In the latter case Vice-Chancellor *Kindersley* decided that the 25th section of the *Statute of Limitations* applied only to an express trust, and not to a trust which could only be made out by consideration of the attendant circumstances. *In re Hindmarsh* (3) is a case which is applicable here, and that was also a claim for an account. In the case of *Knox* v. *Gye* (4) Lord *Westbury* (5) disposes of the question as to what is an express trust against which the statute will not run, and he there uses the expression that a man, though he may be called a trustee by a metaphor and by an improper use of the terms, is still only a trustee to the extent of his obligation to perform a particular act required of him: so here the Defendant may be called a trustee, but the trust is limited to the discharge of a particular obligation. And such a trustee is not liable to all the consequences which would follow if he were a trustee by express declaration. *Burdick* v. *Garrick* (6) has been referred to, but that was the case of an agent who stood in a fiduciary relation to his principal, and therefore very different from such a case as this. That case is commented on in *Watson* v. *Woodman* (7), and Vice-Chancellor *Hall* there said that *Burdick* v. *Garrick* depended on the special nature of the deed under which moneys were to be received and invested. In *Watson* v. *Woodman* it was held that part payment of a debt by a continuing parter, could not be set up against the retiring partner as an answer to the *Statute of Limitations*. We, therefore, submit that, even assuming the Defendant to have been a trustee, he was only so by implication, and there was no express trust that could prevent the statute from running.

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(1) 17 Ves. 87.
(2) 1 Drew. 371.
(3) 1 Dr. & Sm. 129.
(4) Law Rep. 5 H. L. 656.
(5) Ibid. 672.
(6) Ibid. 5 Ch. 233.
(7) Law Rep. 20 Eq. 721.

Then our second point is that there was no acknowledgment of any debt beyond the particular sum of £329, and there was no submission to account generally; all the Defendant submitted to was to shew his vouchers, which proved the state of accounts, bringing out that balance of £329. The Defendant wrote and offered payment of that sum, but it was not accepted, and then the matter was allowed to remain entirely in abeyance for five years. It is impossible to make out upon the letters between the parties any implied promise to pay more than the sum stated. *Francis* v. *Hawkesley* (1) is a strong case in our favour upon this point, for there there was a letter admitting that a balance was due from defendant to plaintiff, and containing a proposal to settle the matter on payment by defendant to plaintiff of a sum named, and it was held that the letter was not a sufficient acknowledgment of the debt within 9 Geo. 4, c. 14, to defeat the *Statute of Limitations*. The letter which is set out in the case of *Mitchell's Claim* (2) was stronger than what we have here, and yet it was held to contain no acknowledgment, taking the case out of the statute. There are other cases applicable to this question, such as *Hart* v. *Prendergast* (3), where the words were, "I hope to pay at all events a portion, and then settle as to the liquidation of the balance;" and *Spong* v. *Wright* (4), *Williams* v. *Griffiths* (5), *Cockrill* v. *Sparkes* (6), and others which are referred to in *Darby* and *Bosanquet* on the *Statute of Limitations* (7).

Rigby, in reply.

May 24. KAY, J.:—

Two questions arise in this case which are of some interest, and upon which I purpose to give my opinion. The action is by the trustee in bankruptcy of the second mortgagee of the ship *Georgian* against the first mortgagee, and against the trustee in bankruptcy of the mortgagor, who disclaims. Practically, it appears that the ship which has been sold has not produced enough to pay the first and second mortgagees in full, so that the mortgagor, who has disclaimed, has no interest.

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(1) 1 E. & E. 1052. 5 Jur N S. 132
(2) Law Rep. 6 Ch. 822.
(3) 14 M. & W. 741.
(4) 9 M. & W. 629.
(5) 3 Ex. 335.
(6) 1 H. & C. 699.
(7) Pages 49–51.

The principal question is whether the action, which I have said is an action by second mortgagees against first mortgagees to make them account, is barred by the *Statute of Limitations*, or by laches; following, as Courts of Equity do, the analogy of that statute. The dates are these: *Lacy*, the owner of the steamship *Georgian*, on the 7th of January, 1873, mortgaged that ship to the Defendant *Berridge*. There was on the same day a collateral agreement, which I shall have occasion to refer to afterwards with reference to one question which arises in this action. On the 5th of February, 1873, *Lacy* mortgaged the *Georgian* to the *Keyworths*, whom the Plaintiff represents, and the mortgage was duly registered shortly afterwards. On the 1st of September notice of the mortgage was given, but nothing seems to turn upon that. In November, 1873, *Berridge* took possession of the ship at *Antwerp*, brought her to *England*, and, on the 10th of December, 1873, sold her in *England* to one *McAndrew*, and received, as I understand, on that date £1850 as the deposit on the sale. On the 3rd of January, 1874, the balance of the purchase-money was paid to *Preston*, the agent of *Berridge*. On the 8th of March, 1880, therefore just over the six years from the date of that receipt, this action was brought against *Berridge* by the second mortgagees, *Keyworths*, or their representative or trustee in bankruptcy, to compel *Berridge* to account.

Now to this action the *Statute of Limitations* was pleaded, and the first reply to that plea is, that there was an express trust; that *Berridge* was bound by an express trust in respect of the moneys which he had received, and that therefore the statute does not apply. As to express trust, there is none in this case in writing. In the ordinary case of a power of sale in a mortgage, the power of sale expresses that the mortgagee, when he receives the mortgage money, shall hold it upon trust to defray expenses, then to pay himself what is due upon his mortgage, and lastly, to pay the surplus to the mortgagor. Nothing of that kind was expressed in this case. The power of sale is the statutory power under the *Merchant Shipping Act*, and the section to which I was referred, which I believe is the only section having any refer-

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ence to the matter, is the 71st section of the *Merchant Shipping Act*, 1854 (17 & 18 Vict. c. 104), which is in these words: "Every registered mortgagee shall have power absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase-money; but if there are more persons than one registered as mortgagees of the same ship or share, no subsequent mortgagee shall, except under the order of some Court capable of taking cognizance of such matters, sell such ship or share without the concurrence of every prior mortgagee." Therefore it is plain that there is a mere expression that the registered mortgagee shall have power to sell and to give receipts, and there is certainly no express trust there of the purchase-moneys.

Then I was referred to certain cases, of which I will mention one or two as being decisions, or something which might help a decision, that under that power a mortgagee selling becomes affected with an express trust of the purchase-money. One case to which I was referred is *Tanner* v. *Heard* (1). There the marginal note states the decision thus: "*A.*, the first mortgagee of a ship, with the sanction and authority of *B.*, the second mortgagee, sold it, and received the proceeds, which exceeded the amount due to him. Held, that *A.* was accountable to *B.* in the character of trustee, and *A.* having insisted that there was a deficiency, and having neglected to account, and a balance having been found against *A.* in a suit by *B.*; held, that *A.* ought to pay the costs of the suit." But I observe in the judgment that the Master of the Rolls very carefully indeed puts this case, not at all upon the ground of *A.* being a mortgagee, but on a distinct ground. He says (2): "The plaintiff says that the mortgage was paid off, that the defendant is a trustee for him of the surplus, that the ship was sold on behalf of both parties, that a balance has been found against the defendant in taking the accounts, and that, consequently, the costs" (it was only a question of costs) "ought to abide the result. I am of opinion that this is not a case in which the principles which obtain in a suit between mortgagees are applicable; I think it distinguishable. It is a case of this description: The defendant was first mortgagee of a ship; the

(1) 23 Beav. 555. 3 Jur. N.S. 1426 (2) 23 Beav. 557.

plaintiff was the second. The defendant, with the sanction and authority of the plaintiff, sold it at *Amsterdam*, and received the proceeds of the sale. Being entitled, in the first place, to the amount due on his mortgage and the expenses of the sale of the ship, and there being a surplus he was bound to account to the plaintiff in the character of trustee." If I understand those words, the Master of the Rolls most carefully distinguishes the case from the ordinary case of a mortgagee, and holds that there was a trust, because the ship was sold by arrangement between the two, and by arrangement between two persons, who were both of them interested in the subject-matter of the sale, the ship being sold by one, and, the proceeds of the sale coming into the hands of that one, he became a trustee of the surplus of those proceeds. Therefore I cannot take that as an authority for saying that a mortgagee selling a ship under the statutory power of sale becomes an express trustee of the proceeds.

Then the other case referred to upon this subject was *Kemp* v. *Westbrook* (1), but that I find again is a totally different case, because it was not, properly speaking, the case of a mortgagee at all, but was the case of a pledge of goods, and there seems to have been no power of sale. Therefore I do not derive from that any authority which helps me at all in this case.

Then I have to look at what, upon general principles, constitutes an express trust, and upon that point I am referred to *Petre* v. *Petre* (2). The language of Vice-Chancellor *Kindersley* in that case was this: he is commenting upon the 25th section of the 3 & 4 Will. 4, c. 27, the section referring to express trusts, which I may mention, because it would seem now to be extended expressly to personal estate by the 25th section of the *Judicature Act*, 1873, to which I was referred. He says (3): "The 25th section is also confined to express trusts, that is, trusts expressly declared by a deed or a will or some other written instrument." If that were a complete and exhaustive definition of an express trust, it is beyond all question that this case would not come within that definition. He goes on to say, "It does not mean a trust that is to be made out by circumstances, the trustee must be expressly appointed by

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(1) 1 Ves. Sen. 278.

(2) 1 Drew. 371.

(3) 1 Drew. 393.

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some written instrument, and the effect is, that a person who is under some instrument an express trustee, or who derives title under such a trustee, is precluded, how long soever he may have been in enjoyment of the property, from setting up the statute. But, if a person has been in possession, not being a trustee under some instrument, but still being in under such circumstances that the Court, on the principles of equity, would hold him a trustee, then the 25th section of the statute does not apply, and if the possession of such a constructive trustee has continued for more than twenty years"—of course he is speaking of land—"he may set up the statute against the party who, but for lapse of time, would be the right owner, that is the construction that I put on the 25th section of the statute."

I do not think that is an exhaustive definition of an express trust, namely, that it must be a trust expressly declared by a deed, will, or some other written instrument. It probably refers to express trusts of land only, which must be in writing; but the case to which I am going next to refer shews that the general meaning can hardly be limited to that extent; however, it is very valuable, as everything that fell from Vice-Chancellor *Kindersley* was, as being an attempt to draw the line between express trusts and trusts by implication or construction of law.

The other case to which I refer, which seems to shew that the definition is not quite large enough if intended to include personal property, is the case of *Burdick* v. *Garrick* (1). There Lord *Hatherley* says: "It would indeed be a strange thing if this Court should be obliged to hold that if a person, for instance, were to deposit plate or jewels with his bankers, intending to be absent from home for a great number of years, and those chattels were converted by his bankers to their own use in fraud of the owner, and the owner were to come back after the end of seven or eight years, he is utterly remediless, either in the shape of an action at law or of a suit in this Court, because the dealing with his property has been in the nature of an agency. I apprehend that the true rule applicable to these cases is to be found in the case of *Foley* v. *Hill* (2), where it is clearly stated by Lord *Cottenham*, who distinguishes between the confi-

(1) Law Rep. 5 Ch. 233, 239.

(2) 2 H. L. C. 28, 35.

dence reposed in a factor or agent, and the confidence reposed in a person who is merely in the position of banker. A mere banker who takes charge of his customer's money is not in any fiduciary relation whatever to him with respect to the particular coins or notes deposited, because it is the ordinary course of trade to make use of them for his own profit. He does make use of them, and he invests the money deposited with him; and his customer does not require from him those very coins or exchequer bills which he deposited with him. But in the present case we have an agent who is intrusted with those funds, not for the purpose of being remitted when received to the principal, but for the purpose of being employed in a particular manner, in the purchase of land or stock, and which moneys the factor or agent is bound to keep totally distinct and separate from his own money; and in no way whatever to deal with or make use of them. How a person who is intrusted with funds under such circumstances differs from one in an ordinary fiduciary position I am unable to see. That being so, the *Statute of Limitations* appears to me to have no application to the case." That obviously enlarges the definition which Vice-Chancellor *Kindersley* gave, and points out that a man may be bound by an express trust where moneys, which in no sense belong to him and in which he has no kind of interest, or goods, plate, or jewels are placed in his hands by the real owner as depositee of them, and that without any writing or even expression in words that it was to be a trust. That would come, according to Lord *Hatherley's dictum* here, within the definition of express trust, and that seems extremely reasonable; and, therefore, one must consider that the express trust is somewhat larger than what Vice-Chancellor *Kindersley* defines it to be in the case to which I have referred.

Now, in that case of *Burdick* v. *Garrick* (1) there could be no kind of doubt about there being an express trust, because the alleged trustee there was a person to whom a power of attorney had been given to collect moneys belonging to the donor of the power of attorney, and with them, amongst other things, to purchase land and to procure the same to be conveyed to and in trust for the donor of the power of attorney, and to invest the residue of such moneys in certain securities, either in the name of the donor of the power, or in the name or names of any other person or persons in trust for him. Therefore, in that particular case there was as plain an expression of a trust as could well be; but still the remarks which I have read from Lord *Hatherley's* judgment go much further, and shew that there may be an express trust without any actual expression in words, where property or money wholly and solely belonging to a person who deposits, is deposited with another person for the benefit of the depositor.

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(1) Law Rep. 5 Ch. 233, 239.

Then, that being the nature of an express trust, the question I have to consider is whether these facts, which I have mentioned, bring this case within that doctrine. In the first place, one cannot help remarking that this is not an entirely analogous case, because the moneys which would come to the hands of the mortgagee upon the exercise of the power of sale were not moneys in which he had no interest, they were moneys in which he had a very large interest; moneys which, if the security should happen to be deficient, would entirely belong to him.

This consideration led me to suggest during the argument a reference to a case which shews how very reluctant the Court is to hold a mortgagee to be a trustee to all intents and purposes. The case I referred to was *Kirkwood* v. *Thompson*, before Lord *Hatherley* when Vice-Chancellor *Wood* (1), affirmed on appeal (2); but in it is cited a case of *Dobson* v. *Land* (3), before Vice-Chancellor *Wigram*, and I am reading the language of the judgment in that case from the judgment in *Kirkwood* v. *Thompson*, because that language was adopted with approval by Lord *Hatherley* in *Kirkwood* v. *Thompson*. Lord *Hatherley*, in referring to *Dobson* v. *Land*, said (4): "The question there was, whether a mortgagee in possession, who in the absence of covenant insured the property, could be treated as having insured for the benefit of the mortgagor, and be allowed to charge the premiums against him." Then he says: "The Vice-Chancellor, after stating the argument that the mortgagee was a trustee for the mortgagor in respect of the policies, says, 'In the absence of authority I am not prepared to adopt that conclusion. I may observe that I do not see how the question could be affected by the circumstance that the mortgagee was in possession. Now, that a mortgagee is in some sense a trustee for the mortgagor may be admitted; for every person in whom the legal estate is vested, with a beneficial interest for another person, in a sense is a trustee for that person. In some sense a mortgagee is in a worse position than a trustee, for a trustee in an ordinary case is not liable to a decree for wilful default unless a special case be proved against him, whereas such a decree is merely of course as against a mortgagee in possession. On the other hand, a trustee can never make a benefit to himself by any dealing with the trust property, but if a second mortgagee should buy in the first mortgage for half its amount, or even obtain an assignment without consideration from the first mortgagee, I can have no doubt he would be entitled to charge the mortgagor with the full amount of the first mortgage in addition to his own. And other cases of a like kind might be put." So much for Vice-Chancellor *Wigram*. Now, in the case of *Kirkwood* v. *Thompson*, Lord *Hatherley* had to consider what was the state of things where a mortgage was entirely in the form of a trust for sale, and a second mortgagee had bought the mortgage property under that trust for sale, and Lord *Hatherley* says this (1): "The defendants no doubt were trustees for sale, but until they do sell they cannot on this account be put in a worse position . . . I see no difference between the case of an ordinary mortgage and that of a trust for sale. It is not such a trust as would enable the mortgagor to file a bill to have property sold, because the discretion as to selling or not is in the mortgagee alone. On the other hand, the mortgagee cannot file a bill to foreclose, but is limited to his remedy by sale. But these distinctions make no substantial difference in his position, which is that of mortgagee." Now, that certainly was a very strong decision, because there was, as far as words can go, the most explicit and express trust that can possibly be imagined; but, nevertheless, although the trust was so very explicit and express upon the face of the deed, Lord *Hatherley* held that the true relation of the parties was that of mortgagor and mortgagee, and he would disregard the very words and hold that a mortgagee was not, to all intents and purposes, a trustee, notwithstanding such express words.

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(1) 2 H. & M. 392. 11 Jur. N.S. 385

(2) 2 D. J. & S. 613.

(3) 8 Hare, 216.

(4) 2 H. & M. 400. 11 Jur. N.S. 387

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(1) 2 H. & M. 402. 11 Jur n.s. 358

That case came before the present Court of Appeal in the later case of *Locking* v. *Parker* (1), and it was commented upon by Lord Justice *James*. In *Locking* v. *Parker*, I should observe, the facts as stated in the marginal note were these: "Before 1829 *L.* had demised two estates to *P.* for long terms of years by way of mortgage. On the 11th of February, 1829, *P.* made to *L.* a further advance, and *L.* by a deed to which *P.* was a party, but not a conveying party, conveyed the fee in those estates and another estate to *C.* upon trust for *P.*"—there was the intervention of a third person there as trustee—"his heirs, executors, administrators, and assigns, nevertheless upon the further trusts thereinafter declared; which were to permit *L.* to continue in possession and receipt of rents till the 11th of August, and if *L.* should then repay the further advance with interest, and the other mortgages charged on the property and thereinafter specified, to reconvey to *L.*, his heirs or assigns; but in default of payment, then that *C.*"—that was the third person, who was simply put in as trustee—"his heirs or assigns, should immediately, or at their or his discretion, enter into possession, and sell the estates, and stand possessed of the proceeds on trust, in the first place, to pay costs, then the sums due to *P.*, with interest, and a sum due on mortgage to another person with interest, and to pay the surplus to *L.*, his executors, administrators, or assigns, *L.* at the same time attorned tenant to *P.* Default having been made in payment, *P.* entered into possession in 1832, and thenceforth received the rents and let the property. Sales were subsequently made of part of the property, the last being in 1848, and *C.* conveyed to the purchasers, *P.* being a party, and it was agreed that all terms should be assigned in trust to attend. In 1871 *L.'s* heir-at-law filed a bill to have the trusts of the deed of 1829 carried into execution:—*Held* (reversing the decision of the Master of the Rolls), that the deed of 1829 did not create a trust of the estate for the benefit of the mortgagor." There had been there possession taken more than twenty years before the filing of the bill, and no subsequent acknowledgment within the meaning of the Act, but there had

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(1) Law Rep. 8 Ch. 30.

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been certain sales under that trust for sale, and the mortgagee had received the money. "It is said, however," says Lord Justice *James* (1), "that there is an express trust in the deed with reference to the sale moneys. The Solicitor-General in his argument admitted that there might be an express trust with reference to the sale moneys, exactly in the same way as where a mortgagee sells under the powers of a common mortgage. In that case, when the estate has been sold there is an express trust of the surplus money for the mortgagor. If, then, there had been any allegation in this bill, or any evidence that there were any surplus moneys, the bill might have been sustained for those surplus moneys. But that is not the frame and intention of the bill. The bill prays the execution of the trusts of the indenture, and is in substance a bill for the redemption of the estate, which, under the circumstances, cannot, according to the view we have taken, be sustained." Then in the earlier part of his judgment he comments upon the case I have last referred to of *Kirkwood* v. *Thompson* (2). He says (3): "The next point which has been argued before us is, whether the deed of February, 1829, standing by itself, is anything more than a mortgage deed with a power or trust for sale. I am of opinion that it is nothing more than a common mortgage security taken by way of a trust for sale, and taken, for very obvious reasons, in the name of a third person. Now, if it be a mere mortgage security, it appears to me to fall entirely within the language of the late Lord Chancellor when Vice-Chancellor *Wood*, in *Kirkwood* v. *Thompson*." He quotes then the words I have read from the judgment in *Kirkwood* v. *Thompson*, and continues: "If I may be permitted to say so, I entirely concur not only in those words but in the spirit of those words, that it is not for a Court of Equity to be making distinctions between forms instead of attending to the real substance and essence of the transaction. Whatever form the matter took, I am of opinion that this was solely a mortgage transaction between the mortgagor and *Lysimachus Parker*," who was the person entitled to the mortgage money.

I have, therefore, a series of decisions—there are other cases to the same effect, but none that I am aware of in the least degree contradicting these—I have a series of decisions shewing that even where the words of the mortgage express a trust in the most clear and emphatic manner, the Court is very loth to hold the mortgagee to be a trustee to all intents and purposes. As I read this last case, where under an ordinary power of sale in a mortgage there is an express trust of the moneys to be received by the mortgagee, that is not a trust which the mortgagor can enforce at all except as to the surplus. Where a trust is so expressed, he may say the mortgagee is a trustee for me of the surplus; but I am dealing with the case where there was no such trust expressed at all, and I have to say whether there is a relation between mortgagor and mortgagee which is to such an extent fiduciary that, in the absence of any such words, I am to hold there was an express trust imposed on the mortgagee, in case he sells, in favour of the mortgagor, or the second mortgagee, which is the same thing. Of course I must look at the consequences. If these persons are trustees, then at any time at least within twenty years, at any time within that at which according to the ordinary rules of Equity a presumption of payment would arise, the mortgagor or the second mortgagee might file a bill against the first mortgagee, alleging that he had sold, and that there was a surplus, and require him to account, and that, although there had been no acknowledgment of the existence of any surplus, or of the mortgagee's right to sue in any shape or way within those twenty years after the sale. That is a very serious position in which to put the mortgagee, and in the absence of distinct authority I should be very reluctant to hold that to be the case. But I take the true result of these decisions to be this, that in this particular case, where there was no trust expressed either in writing or verbally of the proceeds of the sale, no trust can possibly arise until it is shewn there is a surplus, and then I should be disposed to hold that there is sufficient fiduciary relation between the mortgagor and mortgagee to make the mortgagee constructively a trustee of the surplus, in case it is shewn there is a surplus. But that seems to me to be a case not of express trust at all but of constructive trust, that is to say, a case of a trust which only arises on proof of the fact that there was a surplus in the hands of the mortgagee after paying himself. And, if that be so, the ordinary rule of a Court of Equity would

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(1) Law Rep. 8 Ch. 40.

(2) 2 H. & M. 392.

(3) Law Rep. 8 Ch. 39.

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apply, that nobody would be allowed to enter into evidence to raise a case of constructive trust after the statutory period had expired; that is to say, in this case, after six years had expired from the time when the money was received by the mortgagee, without acknowledgment of the mortgagor's title or of there being any surplus, a Court of Equity would not, according to its ordinary rule, allow parties to enter into evidence for the purpose of shewing that there was a surplus in order to raise the case of constructive trust; so that the claim of constructive trust does not help a person in the position of the present Plaintiff, who is attempting to raise that case against the first mortgagee. Accordingly, I hold that the reply on the ground of express trust fails; that the true relation of the parties would be that, if there were a surplus, the mortgagee might constructively be held to be a trustee of that surplus, but that it would be impossible, after the lapse of six years from the receipt of the money without acknowledgment, to allow the Plaintiff to enter into evidence for the purpose of making out that constructive trust, and accordingly the statute is a bar, or at least the Court of Equity, acting upon analogy of the statute, would prevent this case of constructive trust being raised.

But then the other reply was this: that if that were not so—if there was no case of express trust, yet there had been in this case sufficient acknowledgment since the receipt of the money to enable the Plaintiff to avoid the bar of the statute. As to the law upon the subject, several cases were referred to, one of which is the case of *Prance* v. *Sympson* (1).

Now, in *Prance* v. *Sympson*, the plaintiffs being solicitors and promoters of a railway company—"appointed the firm of *A'Beckett & Sympson*, in which the defendant was a partner, jointly with themselves, solicitors to the company upon the terms that in all matters they should act jointly and divide all profits equally." Then afterwards *Prance*, the plaintiff, wrote to *Sympson* thus "Do oblige me by having the *Bridgewater* and *Minehead* accounts made out up to the time of mine as delivered to you. I want it for a particular purpose which presses exceedingly." In reply *Sympson* wrote: "As regards the *Bridgewater* and *Minehead* expenditure, I will sit down to it the very first hour I can devote, which I have long wished to do." Considerably later—two years later—the correspondence was taken up again by *Sympson* writing: "*Bridgewater* and *Minehead:* I have had a long talk with my partner about this matter; he says, and insists that there is a large balance coming to him; but I have put the matter right with him, and you and I must go into it and settle the account. I have allowed him a sum to satisfy him, as, if you remember, there was £1000 paid to you for your preliminary expenses to be accounted for. It is necessary we should sit down to this matter and put it on the square." The question was whether that letter amounted to an acknowledgment which would avoid the bar of the *Statute of Limitations.* Lord *Hatherley*, commenting upon those letters, particularly this last one, says (1): "It may be said that there is some ambiguity in this, but the following words entirely remove it, and I should have thought, even without them, that settling the account meant by paying any balance that might be due; the letter, however, continues: 'I have allowed him a sum to satisfy him, as, if you remember, there was £1000 paid to you for your preliminary expenses, to be accounted for. It is necessary that we should sit down to this matter, and put it on the square.' What can that mean but an engagement that any balance that might be due should be paid? It is argued that the claim referred to in this letter is of money due from or to *A'Beckett;* but the plaintiff could not at that time have such an account with him alone, for he was one of the partners in the firm of *A'Beckett & Sympson*, and no account is stated in the bill, nor did any account apparently exist between him and the plaintiff simply. The plaintiff says to *Sympson*, your partner is going abroad, and ought to settle this account before he goes; the answer is, I have put it right with my partner, and you and I must go into it and settle the account, and we must put this matter on the square. I am of opinion that these letters contain a sufficient acknowledgment of the existence of an unsettled account, and a sufficient promise to settle it in the sense of payment, to take this case out of the statute." Now that case I take to be a decision that in the letter there was not merely the admission of an unsettled account—a pending account which ought to be settled, but also an engagement to pay what might be found due on settling that account. However, a different view seems to have been taken of it by one of the most learned Judges we have had, every word of whose judgments is always deserving of the greatest possible attention. In the case of *Mitchell's Claim* (1), Lord Justice *Mellish* in giving judgment says this: "Now it is perfectly settled law what is the description of letters which will take a case out of the statute. I will read what is laid down by Chief Justice *Jervis* on the subject, in his book called *Jervis's* New Rules, which, in my early days at the Bar, we were constantly in the habit of quoting, and I find this passage cited with approbation by Lord *Campbell* and Mr. Justice *Wightman* in *Everett* v. *Robertson* (2): 'Before this statute'—that is, before Lord *Tenterden's* Act—'not only a verbal promise to pay a debt more than six years old, but a bare unconditional acknowledgment of its subsistence, made within six years before action brought, had been held sufficient to take this case out of the statute. But now in order to revive the liability of the debtor after the expiration of the six years by subsequent acknowledgment or promise, there must be a proof of some writing signed by himself, either containing an express promise to pay the debt or being in terms from which an unconditional promise to pay it is necessarily to be implied. If, therefore, the writer, although he admits the existence of a debt refuses to pay it, or reserves the matter for future consideration, or refers the creditors to some third person for payment or the like, this will not be sufficient to prevent the operation of the statute.'"

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(1) Kay, 678. 18 Ju 929

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(1) Kay, 682.

That is the end of the quotation. Then Lord Justice *Mellish* continues thus: "That being the rule, there must be one of these three things to take the case out of the statute: Either there must be an acknowledgment of the debt, from which a promise to pay is to be implied; or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt and evidence that the condition has been performed." Then he deals with the particular case before him, and later on he refers to Lord *Hatherley's* judgment in *Prance* v.

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(1) Law Rep. 6 Ch. 822, 828. (2) 1 E. & E. 16.

Sympson (1) in these terms: "The case most relied upon was *Prance* v. *Sympson.* There the Vice-Chancellor, as it appears to me, acted strictly in accordance with the rule." Now those words are very important, because in what follows I venture to doubt whether he has quite accurately given the effect of *Prance* v. *Sympson.* But whether he has given it accurately or not, he says that his version of *Prance* v. *Sympson* is strictly in accordance with the rule, and then he goes on to describe *Prance* v. *Sympson* thus: "That was a case of taking an account which could only be taken in a Court of Equity; and there was a letter admitting that the account must be taken and that there was a right to have it taken. From that the Vice-Chancellor inferred that there was a promise to pay what might be found due on the taking of that account, just as here we might infer from the promise to refer to arbitration a promise to pay what the arbitrators might have found due if the arbitration had taken place. With that all the other authorities are perfectly consistent. Of course a variety of cases may be cited, and questions may be raised whether they properly apply to the rules which have been laid down. But the rules are, I apprehend, perfectly clear and perfectly settled. There must either be an admission of the debt, from which a promise to pay may be implied, or an absolute promise to pay, or a promise to pay upon a condition which is proved to have been performed."

Now I venture to say that I doubt whether that is a precisely accurate description of the decision in *Prance* v. *Sympson,* because it seems to me in *Prance* v. *Sympson* the Vice-Chancellor found not merely an admission that the account must be taken and that there was a right to have it taken, and it was not merely from that admission that he inferred a promise to pay, but I think he found in the letter, if I understand his language rightly, an express promise to pay in the words which required a settlement of the account and putting the matter on the square. But, be that as it may, *Mitchell's Claim* (2) certainly shews in the plainest possible manner that it was Lord Justice *Mellish's* opinion that if there was an admission that an account must be taken, and that there was a right to have it taken, it would be consistent with principle, and with the previously decided cases, that you

(1) Kay, 678./18 Jur 929

(2) Law Rep. 6 Ch. 822.

must infer from that a promise to pay. If I may venture to express my own opinion upon the subject, that seems to me to be quite reasonable. I suppose there is no doubt at all about the law that if there be an unqualified admission of a debt, that acknowledgment implies a promise to pay; and surely it seems quite as reasonable that if there is an unqualified admission that there is a pending account between two parties which has to be examined, that is, pending in the sense that it is not a settled account binding upon them, but is an account which either party is at liberty to examine, surely it is reasonable to say that the admission that there was such a pending account is an admission from which you may infer a promise that when the account is settled the balance shall be paid.

Now with that preface I come to the letters which are in question in this case, and I have to see whether they bring this case within the rule. I need not go through the whole correspondence, but I may very briefly refer to the principal letters. On the 28th of August, 1874, *Berridge*, the first mortgagee, writes practically to the Plaintiffs, the persons who were then in the position which the Plaintiff now holds, thus: "In accordance with the promise given you, I herewith enclose statement of *Circassian* and *Georgian* accounts in reference to which I will furnish any explanation required, and all necessary vouchers are at your order for examination. There is a sum of £839 1*s.* 1*d.* standing to the credit of Mr. *Preston* and Mr. *Banner* awaiting final settlement." That must mean final settlement of the account. "I have been to Messrs. *Hollams & Co.'s* offices to-day for their bill, but could not obtain same."

In this letter was inclosed an account which has been put in evidence, and which brings out a balance of the *Georgian* mortgage to *Berridge* of £329 8*s.* 10*d.* due from him to the mortgagor, or the second mortgagee as representing the mortgagor, subject only to a claim entered on the other side—"*Griffiths, Tate, & Co.'s* claim paid on account of *Georgian*, 6th May, 1873, £500," and *Hollams & Co.'s* law charges, which are not carried out but left in blank. So that on the face of the account sent there is an admission that upon that account, unless *Griffiths, Tate, & Co.'s* claim and *Hollams*' claim swept away the balance, there was a balance due to the Plaintiff, the second mortgagee. Besides that admission, there is in this letter, which I have read, a clear admission that it was a pending account unsettled, because he says in reference to this account, "I will furnish any explanation required, and all necessary vouchers are at your order for examination." Moreover, there is a reference to a sum of £839 1*s.* 1*d.* standing to the credit of *Preston* and *Banner* awaiting final settlement. Therefore I have no hesitation whatever in holding that this letter and the account sent in it are a most clear admission of a pending account, and more, that they amount to an admission that there will, in any event, unless *Hollams & Co.'s* law charges should be very large, be a balance due to the second mortgagee, because to the £329 has to be added the £839, which would more than cover the £500, *Griffiths'* claim. Now that letter was written within six years before the commencement of this action, and if the matter stood there I should have no hesitation in holding that it is a sufficient acknowledgment to take the case out of the statute. But the matter does not rest there, because on the same day *Berridge* writes again to the same persons, "Since writing you to-day I find there is a further sum in the hands of Mr. *Preston* of £95 4*s.* 10*d.*, the balance of the captain's account." That would swell the amount due to the second mortgagee, or at least increase the amount that was to be applicable to the £500 and the law charges, and make it still more probable, even if those claims ripened into a debt, that there would be something more coming to the second mortgagee.

Then comes a letter of the 30th of October, 1874, from *Cooper*, who I understand was *Berridge's* agent, which letter now since the *Mercantile Law Amendment Act,* 19 & 20 Vict. c. 97, s. 13, may be, although signed by an agent, a sufficient acknowledgment. The letter says this: "I am requested by Mr. *Berridge* to state that he has been expecting to hear from you in reference to his letter of the 28th of August and account accompanying same, and that he would be obliged by your informing him if you are prepared to receive the balance." If there was the smallest doubt as to the meaning of the former letters, that puts it beyond question that now Mr. *Berridge* was prepared shortly after the letter of the 28th of August to pay over the balance appearing by the account to the second mortgagee. I suppose that the claim of *Griffiths & Co.* and *Hollams'* law charges had been settled in some other way, or were abandoned.

There are certain other letters which also are material. The correspondence seems to have gone to sleep till the 24th of November, 1879, when the matter was awakened up again by a longish letter from Messrs. *Martin*, the solicitors of the Plaintiff. That is the letter objecting to the charge for interest which is contained in the account. I have been referring to it, and the letter ends, "The writer and one of the partners in Messrs. *Banner & Son*, will be in *London* on Monday next; if you will make an appointment by Friday or Saturday we can arrange an interview, when I hope the various questions may be satisfactorily arranged." *Berridge* answers on the 27th of November, 1879: "I am in receipt of your letter of the 24th instant, and in reply to your request for an interview, beg to say that I shall be happy to meet you at Mr. *Preston's* on Monday next at one o'clock." On the 23rd of December, 1879, Messrs. *Martin* write again: "We are still without the accounts asked for in our letter of 24th November and promised by you at our interview in *London*. We must ask you to let us have the accounts by return of post so that the matter may be properly settled. Will you be good enough also to send us the authority of Mr. *Preston* to concur in the payment out of the money in the bank in his and the owner's name to Mr. *Banner*." That referred to the £839 mentioned in one of the former letters I have read. Now the answer to that letter is also very important. *Berridge* writes himself, "I am this morning in receipt of a letter from you dated the 23rd inst. I inclose the envelope to shew that it was posted at *Liverpool* yesterday. Since my removal here my papers have been in a very confused state. I will endeavour to find those relating to the *Georgian*, and as soon as I have done so will write you thereon. The whole matter should be disposed of at the same time."

Now, it is obvious to me that last paragraph referred to the request to authorize *Preston* to join in transferring the £839, and *Berridge* says, "No; the whole matter is to be disposed of at the same time." What does that mean? It can only have one meaning, namely: There is a pending account between you and me, probably there will be something due to you, perhaps not. The account has to be settled, and the whole matter is to be disposed of at one time, and when you ask me to concur in handing over money to you I defer doing that until the account is finally settled, and then there is to be a proper payment.

Then the correspondence continues, and on the 3rd of January—and this is the only other letter I care to notice—Mr. *Berridge* writes: "In compliance with your request I enclose a copy of Mr. *Preston's* account (which is entered, 'By cash *Preston*' in the first account sent as to the proceeds of the sale of the *Georgian*) by which you will see how the sum of £17,739 0*s.* 4*d.* was arrived at. The vouchers for payment will be at your service for examination at any time. There will be some debit on *Circassian* account to charge to the *Georgian* account." Every line of that letter, both the submission to produce the vouchers and the statement that there would be another item to be entered in their shipping account, shews that *Berridge* treated the account as being a perfectly open and unsettled account, and I cannot in the least doubt that the result of this correspondence—and I am entitled to take it all together if it be necessary—is a clear admission not only that there was a pending account which must be settled, in the sense of having the account properly taken and arranged and vouched, but also a clear promise, which I think is sufficiently expressed, that whatever is found due upon the taking of that account will be paid by *Berridge.* Therefore I do not think it necessary to call in aid the words which I have read from Lord Justice *Mellish's* judgment in *Mitchell's Claim,* because I think in this case there is not merely an acknowledgment that an unsettled account is pending from which it would be possible to infer a promise to pay, but there is thrown in a clear promise upon the face of these letters to pay that which may be due upon the account. I have, therefore, not the least hesitation, looking at this correspondence, in holding that although in my opinion the *Statute of Limitations* was not avoided in this case upon the ground of express trust, it is avoided by there having been a sufficient acknowledgment within six years, and accordingly I shall direct an account to be taken of the *Georgian* mortgage in the usual form against a mortgagee in possession, which possession was taken in November, 1874.

There are two other questions which have been submitted to me. I am asked to decide whether certain items which are entered in this account are items properly chargeable against *Berridge*, the first mortgagee. One is this, "Due on *Retriever*," in lieu of notice from the 20th of June, 1872, one year and 198 days, and that is carried out £69 8*s.* 2*d.*, and £450 being the capital account. The question is whether the moneys due on the *Retriever* can possibly come into this account at all. Now as to the *Retriever*, the facts are that the *Retriever* was at Christmas, 1871, posted as missing, and that in April, 1872, the policies of insurance upon her were paid to *Berridge*, and therefore some years before, or more than one year at any rate before, the sale of the *Georgian*, the *Retriever* disappeared altogether, the subject of it was gone, the moneys which represented it being insurance moneys which had been received by *Berridge*, and the only mode in which any moneys in respect of the *Retriever* could be brought into this *Georgian* account would be on the principle of consolidation, but no argument was addressed to me of that sort, and I suppose that the case of *Ex parte Williams* (1) would be conclusive against it, the short point there decided being that after a mortgage had ceased to exist there could be no consolidation of the mortgage debt. That would seem to apply to this case, and prevent anything on account of the *Retriever* mortgage being brought into this account.

Then the other point submitted to me was this: There was in that account a claim for six months' interest on the balance due on the *Georgian* mortgage in lieu of notice. I have said that there was on the same day as the *Georgian* mortgage a contemporaneous agreement, and amongst other things, in the second clause this is provided, "That the said *John Lacy* shall pay to the said *R. Berridge* interest on the sum from time to time due on this security half-yearly in advance on the 1st day of January and July at the following rate," and so on. Therefore the 1st day

(1) 16 Ch. D. 117.

of January, 1874, would be the day upon which half of the year's interest would be payable in advance under that agreement. But then I find the facts to be these: that before the 1st of January, 1874, namely, on the 10th of December, 1873, *Berridge* had contracted to sell the *Georgian* and had received the sum which I have already mentioned by way of deposit. The purchase was to be completed within thirty days, which would extend over the 1st of January, 1874. Now the question is, whether I can allow in that state of things a mortgagee who has voluntarily sold the mortgaged property before the day upon which the interest becomes payable in advance, but has not received the money, to claim the interest payable in advance when he receives the balance of the money, more than enough to pay him, two days after the day for payment in advance of the interest. I conceive that this not being a case in which the mortgagor was paying off the mortgage, or in which the mortgagor had requested anything in the matter to be done, but where the mortgagee was acting of his own mere motion in realizing the subject of the mortgage, it would be in the last degree inequitable to allow him to have six months' interest for a period, during the whole of which, except two days, he would have the mortgage money in his own pocket. I, therefore, upon the ground of its being an inequitable claim—one of those inequitable claims which the Court always watches with jealousy in a case between mortgagor and mortgagee—disallow that six months' interest, and allow him interest down to the 3rd of January, 1874, on the moneys from time to time due and owing on the mortgages. I believe that settles all the questions referred to me.

The decree, therefore, will be for an account to be taken in this way: An account of all moneys received by *Berridge* as mortgagee in possession of the ship *Georgian*, including in that account the £95 received by him from the captain, and an account of what was due to *Berridge* for principal, interest, and costs on the mortgage, but in that account no allowance to be made to him for the costs of the action up to and including the hearing which are to be paid by him to the Plaintiff. Then as to the two items for interest, *Berridge* is not to include in the account any moneys due in respect of the *Retriever*, and he is only to be entitled to

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interest up to the 3rd of January, 1874, upon the *Georgian.* The balance to be paid within one month, and upon the balance, if any, *Berridge* is to be charged 4 per cent. interest, and there will be liberty to apply as to costs, and generally.

Solicitors: *Wynne & Son*; *Hollams, Son, & Coward.*

T. W. G.

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[1880 S. 1707.]

Sale by Auction—Statute of Frauds—Identification of Property.

The Plaintiff claimed specific performance of a contract to purchase a house and premises sold by auction. After the sale the auctioneer signed the following memorandum at the foot of the conditions: "The property duly sold to *A. Shardlow*, butcher, *Pinxton*, and deposit paid at close of sale," and he also signed this receipt: "*Pinxton*, March 29th, 1880. Received of *A. Shardlow* the sum of £21 as deposit on property purchased at £420 at *Sun Inn, Pinxton*, on the above date. Mr. *G. Cotterell*, owner." The *Statute of Frauds* was set up in defence. The conditions contained no description of the property sold, but posters had been put up describing the property to be sold on the 29th of March at the *Sun Inn.*

Held, that the receipt, but not the poster, might be read with the memorandum, but that without the poster there was not a sufficiently definite description of the property sold and purchased to enable the Court to receive parol evidence of what the property consisted; and that consequently the *Statute of Frauds* was a good defence to the action.

Revd on app (20 Ch D 90) C.A.

ON the 29th of March, 1880, certain property belonging to the Defendant, *George Cotterell*, at *Pinxton*, in the county of *Derby*, consisting of a dwelling-house and the stable and other buildings connected therewith, and the brickyard adjoining thereto, were put up for sale by auction at the *Sun Inn, Pinxton.* One of the conditions of sale was that the whole of the purchase should be completed on or before the 19th of April following, and the money should be then paid at the office of Mr. *Rickards,* solicitor, and the conditions contained an undertaking that entire possession of the property should be given up on the 26th of April. The conditions contained no description of the property to be sold, but were headed "Property Sale at *Sun Inn, Pinxton,* March 29, 1880." Posters had been previously set up describing the

A demurrer on the ground of the Stat. of Frauds had been previously overruled S.C. W.N. 1881, 2. W.R.

property to be sold on the 29th of March at the *Sun Inn, Pinxton.* The Plaintiff attended the sale and bid for the property, and was duly declared the purchaser thereof at the price of £420. The following memorandum was thereupon appended at the foot of the conditions of sale and signed by *Henry Maiden*, the auctioneer, who then handed the same to the Plaintiff: "The property duly sold to Mr. *Arthur Shardlow*, butcher, *Pinxton*, and deposit paid at close of sale." The auctioneer at the same time wrote out and gave to the Plaintiff the following receipt: "*Pinxton*, March 29, 1880. Received of Mr. *Arthur Shardlow* the sum of £21 as deposit on property purchased at £420, at *Sun Inn, Pinxton*, on the above date. Mr. *George Cotterell, Pinxton*, owner." Signed *Henry Maiden*. The Plaintiff instructed Mr. *Rickards*, who was also acting as the Defendant's solicitor, to prepare the conveyance of the property, and on the 19th of April the Plaintiff attended at Mr. *Rickards*' office with the balance of the purchase-money for the purpose of completing the purchase. The Defendant attended at the same time and place, but he refused to execute the conveyance and to complete the sale, on the alleged ground that the property had been sold under its real value. The Plaintiff claimed a declaration that the memorandum and the receipt signed by the said *Henry Maiden* on the 29th of March, 1880, or one of them, constituted a binding agreement between the Plaintiff and Defendant for the sale and purchase of the property aforesaid at *Pinxton*, and that the said agreement ought to be specifically performed and carried into execution accordingly.

The defence was that the memorandum and receipt given to the Plaintiff by the auctioneer were neither an agreement for sale of the property in the statement of claim mentioned, nor any memorandum or note thereof in writing and signed by the Defendant or any person thereunto by him lawfully authorized within the meaning of the *Statute of Frauds*, 29 Car. 2, c. 3, and the Defendant pleaded that statute as a defence to this action; and the Defendant further stated that before the sale he had instructed *Henry Maiden* not to sell the property for less than £500, and that he left the preparation of the conditions of sale to the auctioneer, having regard to the above instructions and intending and believing that the proper notice would be given to intending purchasers that the sale was subject to a reserve bidding, and the said *Henry Maiden* had no authority to sell except subject to such reserve.

To this defence the Plaintiff replied that the particulars of the property were contained in a printed bill prepared by the auctioneer, copies of which were posted by him under the instructions of the Defendant. That the said bill contained a full description of the property to be sold at the *Sun Inn* on the 29th of March, 1880, and that such property belonged to the Defendant. That the Defendant was present during a portion of the time the sale was going on, and upon his leaving the room in consequence of illness he left his wife and stepfather to protect his interest, and it was by their instructions that the auctioneer accepted the Plaintiff's bid for £420, at which sum the lot was knocked down to him, and it was denied that the auctioneer received instructions to place any reserve price upon the property, but that if there had been any such reserve price it was not made known to the Plaintiff and could not affect his right to relief in this action. That at the conclusion of the sale the Defendant's wife thanked the auctioneer for having obtained so good a price, which was in fact the full value of the property, and that no complaint was made by the Defendant as to the price until the day upon which the purchase was to have been completed.

The Plaintiff and *Henry Maiden*, the auctioneer, gave evidence confirming the statements in the claim and reply.

The question arising on the *Statute of Frauds* was argued before the remainder of the evidence was put in.

Rigby, Q.C., and *J. G. Alexander*, for the Plaintiff:—

There are two defences set up to our claim ; one is the *Statute of Frauds*, and the other that the Defendant before the sale had told the auctioneer that the property was not to be sold for less than £500, and therefore he had no authority to sell for £420. Upon the latter question we have evidence to contradict the Defendant's allegation.

As to the defence of the statute the question is whether the two documents—the agreement and the receipt signed at the foot of the conditions of sale—can be taken together, and whether they sufficiently describe the vendor and the property sold, to satisfy the requirements of the statute. As a matter of fact, no one could have any doubt as to these points, for the sale took place in a village where Mr. *Cotterell* lived and where his house and premises were perfectly well known to all who attended the sale. The Plaintiff knew what he was purchasing and the auctioneer knew what he was selling, and it was described on large posters throughout the district, as we have proved. However, notwithstanding these perfectly well-known facts, the Defendant has thought fit to set up the statute, and we have to meet the technical objection. Now we contend that the two documents must be read together, and that the poster can be used to make the documents more distinct.

In *Long* v. *Millar* (1) there were two documents very much resembling those in the present case; one was an agreement signed by the purchaser "to purchase the three lots of freehold land in *Rickford Street* for the sum of £310," and the other was a receipt for the deposit of £31, signed by the vendor's agent. It was there held that the two documents taken together constituted a valid memorandum in writing and sufficiently satisfied the requirement of the *Statute of Frauds*, which was set up as a defence. That, in fact, there was sufficient reference in the receipt signed by the agent to allow the Court to connect it with the agreement containing a reference to the property, which was signed by the purchaser. Here we have the two documents connected together and forming a written contract to purchase this property, and we contend that by the same means you can also connect the two documents with the poster.

In *Western* v. *Russell* (2) a similar decision was come to with respect to two letters. Then there is *Ogilvie* v. *Foljambe* (3), in which parol evidence was admitted to explain the subject-matter of an agreement, and *Baumann* v. *James* (4), where parol evidence was also admitted to connect the correspondence which had taken place between the parties; and *Macdonald* v. *Longbottom* (5), ad-

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(1) 4 C. P. D. 450.

(2) 3 V. & B. 187.

(3) 3 Mer. 53.

(4) Law Rep. 3 Ch. 508.

(5) 1 E. & E. 977. 5 Jur NS 1102

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mitting parol evidence to shew the meaning of an expression in a letter, and *Owen* v. *Thomas* (1), also admitting a document to prove what particular house was intended.

The description of the vendor in this case is "Mr. *George Cotterell*, owner." In the case of *Rossiter* v. *Miller* (2) it was held that the word "proprietor" was sufficient description of the vendor; and in *Catling* v. *King* (3) the vendor was not named, the conditions of sale only stating that the vendor was a trustee selling under a power, and that was held to satisfy the *Statute of Frauds*. We shall be able to shew by parol evidence that the Defendant instructed the auctioneer to sell his dwelling-house in which he resided, and other things connected therewith, together with the premises adjoining in which he carried on business and of which he was the owner, so that it cannot be said that you are not able find out what the other things are. Under these circumstances the *Statute of Frauds* cannot be raised, and we are entitled to specific performance.

[They also cited *Horsey* v. *Graham* (4) and *Sugden's* Vendors and Purchasers (5).

Whitehorne, Q.C., and *W. Fooks*, for the Defendant:—

First, we contend that there is no contract within the *Statute of Frauds;* and, secondly, that any contract entered into under such circumstances of misapprehension will not be enforced by the Court. Here there are not two documents alone to be connected, but several documents, because, unless they can bring in the poster as evidence, there is no description of the property, and there is nothing in the two documents to entitle the Plaintiff to introduce parol evidence to describe the property. There is on the face of these documents a patent ambiguity, to explain which you cannot allow parol evidence. That proposition is well explained in *Fry* on Specific Performance (6) in these words: "It is essential that the description of the subject-matter should be so definite as that it may be known with certainty what the purchaser imagined himself to be contracting for, and that the Court may be able to ascertain what it is." The principle is clear that you cannot bring in parol evidence to explain a patent ambiguity: *Ogilvie* v. *Foljambe* (1); *Kennedy* v. *Lee* (2). The words "the property" are not enough to describe anything.

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(1) 3 My. & K. 353.
(2) 3 App. Cas. 1124.
(3) 5 Ch. D. 660.
(4) Law Rep. 5 C. P. 9.
(5) 14th Ed. 136.
(6) 2nd Ed. p. 146, sect. 327.

It was held in *Williams* v. *Lake* (3) that no document could amount to an agreement within the *Statute of Frauds* unless it specified on its face, either expressly or by reasonable construction, both the subject-matter and the names of the contracting parties. In *Owen* v. *Thomas* (4) there was no actual mention of what house in particular was the subject of the contract, but then there was a reference to a deed which contained the requisite description. *Blagden* v. *Bradbear* (5) is a case strongly in our favour, where it was held that an auctioneer's receipt for deposit which did not contain expressly or by reference the terms of the contract could not have the effect of an agreement binding on the vendor within the statute. That case, also, is an authority in support of our second point, for there the defendant told the auctioneer immediately before the sale that he would not take less than £1000 for the property. It was sold for £805, and that was held not to bind the vendor. In *Coles* v. *Trecothick* (6) it was held to be essential for the purpose of binding the vendor that the terms of the contract should be connected with the letter containing the agreement. The necessity of strict identity as to the property and the vendor, in order to satisfy the requirements of the statute, is shewn by the cases of *Potter* v. *Duffield* (7), *Commins* v. *Scott* (8), and *Morris* v. *Wilson* (9).

Rigby, in reply, cited *Wood* v. *Scarth* (10), and *Dart's* Vendors and Purchasers (11).

KAY, J.:—

These cases involve very considerable difficulty, and one cannot help sometimes lamenting that so much latitude has been given in construing the words of the *Statute of Frauds*.

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(1) 3 Mer. 53.
(2) Ibid. 441.
(3) 3 E. & E. 349. 6 Jur. N.S. 5.
(4) 3 My. & K. 353.
(5) 12 Ves. 466.
(6) 9 Ves. 234.
(7) Law Rep. 18 Eq. 4.
(8) Ibid. 20 Eq. 11.
(9) 5 Jur. (N.S.) 168.
(10) 2 K. & J. 33.
(11) Chap. xviii. s. 7.

The question I have to consider is whether there is in this case a sufficient writing to satisfy the requirements of the *Statute of Frauds* in a purchase of real and personal property.

The action is brought by Mr. *Shardlow*, the purchaser, against Mr. *Cotterell*, the alleged vendor of the property in question, and it seeks to have a declaration that a certain memorandum and receipt signed by Mr. *Maiden* on the 29th of March, 1880, or one of them, constituted a binding agreement between the Plaintiff and Defendant for the sale and purchase of the property mentioned in the statement of claim at *Pinxton*, and for specific performance. One of those documents is a document signed by *Maiden* in these terms: "*Pinxton*, March 29, 1880. Received of Mr. *Arthur Shardlow* the sum of £21 as deposit on property purchased at £420 at *Sun Inn*, *Pinxton*, on the above date. Mr. *George Cotterell*, *Pinxton*, owner. Received by *Hy. Maiden*." That is signed "*Henry Maiden*" *Henry Maiden*, it seems, was an auctioneer, who on that day, the 29th of March, 1880, sold certain property at the *Sun Inn* at *Pinxton*.

The first question I have to consider is whether there is any reference in that document to any other document; and most certainly if I were looking at this for myself, unaided by the authorities cited to me, I should say there was no such reference whatever. But then there is cited to me a case, *Long* v. *Millar* (1), where there was a receipt in these terms: "21st September, 1877. Received of Mr. *Geo. Long* the sum of £31 as a deposit on the purchase of three plots of land at *Hammersmith*." I must say, I think it would puzzle any ordinary man, not being a lawyer, applying himself to the niceties of these questions under the *Statute of Frauds*, to find any reference in that to any other document. However, the decision of the Court of Appeal, of the highest possible authority, constituted of Lord Justice *Bramwell*, Lord Justice *Baggallay*, and Lord Justice *Thesiger*, was, that there was a reference in that receipt to another document; and the way that was arrived at was this. Lord Justice *Bramwell* says (2), "The point to be established by the Plaintiff is that the Defendant has bound himself, and a receipt was put in evidence signed by him, and containing the name of the Plaintiff, the amount of the deposit, and some description of the land sold. The receipt uses also the word 'purchase,' which must mean an agreement to purchase, and it becomes apparent that the agreement alluded to is the agreement signed by the Plaintiff, so soon as the two documents are placed side by side." That is an expression of Lord Justice *Bramwell's* opinion that the word "purchase" in that receipt referred to some agreement to purchase, and that enabled him to connect a former agreement to purchase with the receipt. Lord Justice *Baggallay* says the same thing. He says (1), "Out of these materials can a valid memorandum in writing be framed? I think it can. The true principle is that there must exist a writing to which the document signed by the party to be charged can refer, but that this writing may be identified by verbal evidence. I think that in the present case, by the words 'purchase of three plots of land,' the receipt sufficiently refers to the document signed by the plaintiff. Therefore, the contract seems to me to be complete." Lord Justice *Thesiger* says the same (2): "The receipt contains the word 'purchase,' which must refer to the purchase of the plots of land mentioned in the document signed by the Plaintiff." That enabled them, therefore, to refer to what? To a document which was an agreement, and not to anything else. They thought the word "purchase" implied an agreement, and the Court felt at liberty to refer to another document containing the agreement, and parol evidence was admitted to identify the document, and to shew that it was the only document which contained any such agreement. The document referred to was this, "I hereby agree to purchase the three plots (forty feet frontage) of freehold land in *Rickford Street, Hammersmith,* for the sum of £310, and I agree to pay as a deposit and in part payment of the aforesaid purchase-money, the sum of £31, and to complete the purchase and pay the balance of the purchase money on or before the 5th day of October next." That is signed "*George Long.*" No doubt, bringing those two documents together, you found all the terms of a complete agreement. There was the name of the vendor, there was the name of the purchaser, and there was a very sufficient description of the property and the price for which it was sold; but that is not an authority for connecting by means

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(1) 4 C. P. D. 450.

(2) 4 C. P. D. 454.

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(1) 4 C. P. D. 455.

(2) 4 C. P. D. 456.

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of the word "purchase" any other document except an agreement.

Now, what have I got in this case? I have got a receipt that does not contain the word "purchase," but "purchased." That must be just as referential a word as the other. If there exists an agreement that can be identified by parol evidence — any agreement in writing—I am bound by *Long* v. *Millar* (1) to say that the word "purchased" is a sufficient reference to that other agreement. There does exist here another document that may fairly be called an agreement although not complete. It is in these terms, "Property sale at *Sun Inn, Pinxton*, March 29, 1880." The date of that and the date of the receipt are identical. Then it contains conditions of sale which are these: the highest bidder to be declared the buyer, and at the close of the sale 5 per cent. to be paid down as deposit on the purchase by the buyer, the whole of the purchase to be completed on or before the 19th of April next, and the money to be paid by the purchaser. There is a condition about forfeiting the deposit, and a condition that the amount of each bid is to be regulated by the auctioner. Then comes this:—"Further, Mrs. *Cotterell* agrees to give up entire possession of the property on the 26th of April, seven days after the purchase is completed." And at the foot there is this memorandum: "The property duly sold to Mr. *Arthur Shardlow*, butcher, *Pinxton*, and deposit paid at close of sale. *Henry Maiden*, Auctioneer." I hold that I am bound by the authority of *Long* v. *Millar* to treat those two documents as connected. Then I find the name of the owner, Mr. *George Cotterell;* I find the name of the purchaser, Mr. *Arthur Shardlow;* I find the price £420; but the only description of the thing sold is contained in these words in the receipt: "Property purchased at £420 at *Sun Inn, Pinxton*, on the above date" (that is, the 29th of March, 1880), "Mr. *George Cotterell, Pinxton*, owner," and the other document does not help me in the least in that respect.

Now the question is, first of all, stopping there, is that a sufficient description to satisfy the requirements of the *Statute of Frauds?* It is sought to aid this by introducing another document, a poster. That poster I cannot possibly look at, unless I can find a sufficient reference to it in one or other of these documents which are so connected. Is there any such reference? According to *Long* v. *Millar* (1) the referential word "purchase" only enables me to look at an agreement. I quite agree that in the case of correspondence the Court is at liberty to look at all the letters, but this is not correspondence. How am I to connect this poster with the two other documents, or to find a reference in either of the other documents to the poster? I find myself quite unable to do that. Now that I know all about this poster, what I do know is that it was posted about in the neighbourhood, and sent round to the public-houses previously to the sale as a description of what was intended to be sold. I have no evidence that it was in the room at the time of the sale, and there is really nothing to connect it, if I could admit the parol evidence, with the actual sale, except the fact that it had been posted in the district previously. I know of no case in which a poster has been held to form part of a contract for sale by auction, nor can I conceive it would be proper to do so unless the written contract referred with sufficient distinctness to that poster. Therefore I hold I am unable to connect the poster with the other two documents, or to treat it as forming any part of the written contract.

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(1) 4 C. P. D. 450.

The question then reduces itself to this: Have I or not on the face of these two documents, which I do connect on the authority of *Long* v. *Millar*, a sufficient description of the property sold and purchased to satisfy the requirements of the *Statute of Frauds?* It is said I have, because the property is described as property purchased at the *Sun Inn* on the 29th of March, 1880, and it is said that that enables the Plaintiff to give parol evidence of what was the property sold at the *Sun Inn* on that day, and that in that way you can apply the maxim *id certum est quod certum reddi potest*, and say there is a sufficient description on the face of that document to satisfy the requirements of the *Statute of Frauds*.

Now let me see what the authorities are on that subject. I do not pretend to go through them all, but I will take those which are most in point. The first case cited was *Ogilvie* v. *Foljambe* (2). There was a correspondence in that case which is thus set out in the report: On the 26th of June the plaintiff wrote this: "Mr. *O.* has the pleasure to acquaint Mr. *F.* that Mr. *Coutts* agrees to allow the mortgage to continue for a year, if Mr. *F.* will be so good as to call, and promise not to exceed that time without further arrangement. Mr. *O.* has, by the advice of Mr. *Hermon* (the auctioneer), reduced the price of the house to £2000, and he is confident that in a year or two it would sell for from £2000 to £4000 more than he offers it at to Mr. *F.*" There are some further extracts which I need not read. Then comes this: "At least Mr. *O.*, after the fullest consideration and with every wish to conclude an agreement, cannot come down lower than £14,000 for the house and fixtures of every kind—three French plate chimney-glasses, two ditto pier-glasses, with satin-wood tables, &c." That is a description of some of the fixtures, and then it goes on: "but to shew his desire of approximation, he will request Lady *Mary's* acceptance of a pier-table of the same kind, &c. (specifying several articles of furniture), Mr. *F.* agreeing to take the window-curtains, carpets, and furniture on the principal floor by valuation." There is more, but I need not read it. Then the answer was this: "Mr. *Foljambe* presents his compliments to Mr. *Ogilvie*, and is extremely obliged to him for his note, and for the very liberal and accommodating terms which he has proposed, and, in consequence of it, although Mr. *F.* is still of the same opinion as to the value of Mr. *O.'s* house, according to the times, he will not trouble Mr. *O.* with any further discussion, but agree to the terms first proposed—to give £14,000 for the premises, including fixtures of every description, the pier and chimney glasses, &c." Now I am told that is an authority for what the Plaintiff contends for here; that "the property sold at the *Sun Inn*" is a sufficient description. I think that is as wide of this case as anything can be. The description there was of a thing which it was shewn the parties had been bargaining about—the house with fixtures. It did not say leasehold house or freehold house, it is true, but still there was no doubt that would mean the fixtures in that particular house. There the description being of a house belonging to the vendor, which the vendor was selling, it was said by Sir *William Grant* that, "The subject-matter of the agreement is left, indeed, to be ascertained by extrinsic evidence, and for that purpose such evidence may be received. The defendant speaks of 'Mr. *Ogilvie's* house,' and agrees 'to give £14,000 for the premises;' and parol evidence has always been admitted in such a case to shew what house and to what premises the treaty related." Those words must be read with the light thrown upon them by the facts stated in the former part of the report. The "premises" there meant the house and fixtures described in the previous part of the correspondence, and, although the name of the house was not given, the parties themselves could not be for a moment in doubt what they were bargaining about; and there was a description of specific property—a house and fixtures to which that bargain related. Then it became merely a question of what may be called the curtilage, the ambit, the size, and the position of the particular house about which it was apparent on the contract neither party had the faintest doubt in his own mind. I have not got anything like that here. I have no description. I do not know, on the face of the contract, or by anything I am entitled to look at, whether it was real and personal estate, or partly one and partly the other, and I have nothing except the vague description "property," and that it belonged to Mr. *Cotterell*, the owner. There is a wide distinction between that case and the present.

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(1) 4 C. P. D. 450.

(2) 3 Mer. 53.

Well, then, besides that I am referred to the case of *Wood* v. *Scarth* (1). There the contract was again by correspondence, and the correspondence was this: *Scarth* wrote, "Gentlemen,—The terms for the intended new public-house at *Putney* are £30 yearly rent to Lady-day next, and from that time £63 on a lease of twenty-five years to commence from the next quarter day after obtaining the house. There will be no difficulty about Mr. *Young*, a neighbouring proprietor, he is wholly in my interest, and I have at ground-rent and rack-rent 100 houses near it. Pray let me know if it suits you at your earliest convenience, as I am giving all the brewers who left cards the offer in rotation." I need not read the rest. Then there were some intervening letters, and the ultimate answer was this: "Dear Sir,—I was in hopes I might find you here to-day. I have viewed the premises, having had my clerk's report, and we are willing to take them of you. Any further communication addressed to the brewery shall be attended to." There could be no doubt in the world—it is elementary—that you must take a series of letters and read them all. There could be no doubt what the premises there were. That was not the objection. The objection raised in the case was that it was not shewn there was any written acceptance of the terms of the first letter, for the plaintiff's letter signifying he would take the house did not refer to the letter of the defendant. That was answered by the learned Judge, who said that unless the defendant could prove that some other terms were referred to, and not those in the first letter, he must take it as proved that those were the terms on which the plaintiff agreed to take the house, and the two letters taken together would form a complete agreement by which the plaintiff would be bound. He found in the two letters, putting them together, a description of the property, which was quite sufficient, and a sufficient description of the term and extent of the lease, and of the rent to be charged. There was, therefore, no difficulty in that case such as arises here.

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(1) 2 K. & J. 33.

Then I am referred to two cases which seem to me to point to the distinction which I conceive exists between this case and the cases of *Ogilvie* v. *Foljambe* (1) and *Wood* v. *Scarth* (2). The first case is *Sale* v. *Lambert* (3), where "upon a sale by auction of real estate in lots the particulars stated that the sale was by direction of the proprietor; but the name of the vendor did not appear. A memorandum indorsed on a copy of the particulars was signed by the purchaser of one of the lots and by the auctioneer on behalf of the vendor. Held, that the vendor was sufficiently described." The question was not the same as arises here, but it is a case which helps me to the solution of this question very well. The question was whether the "proprietor" was a sufficient description of the vendor, the statute requiring that the name or a sufficient description of the vendor shall appear on the face of the contract; and it was held it was, because there could be no doubt or reasonable dispute about who was the proprietor of the property to be sold, the property itself being sufficiently described, and there being a sufficient description to enable the parties to adduce evidence to shew what his name was.

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(1) 3 Mer. 53.

(2) 2 K. & J. 33.

(3) Law Rep. 18 Eq. 1.

But the very next case, decided by the same learned Judge—the Master of the Rolls—of *Potter* v. *Duffield* (1), shews where the line is to be drawn. In *Potter* v. *Duffield* the description was not "proprietor" but "vendor," and his Lordship held "vendor" was not enough. The reason seems to me plain without looking at the judgment, because "vendor" is not necessarily the description of an individual proprietor. "Proprietor" means *A. B.*, somebody whose name can be put in the contract; but vendor may be very indefinite, and I adopt what was said in the argument, that if you introduce parol evidence to explain who the vendor was you are doing the thing which the *Statute of Frauds* intended to prevent. You may have a contest on that evidence, and it may be said, "It is very well for you to say *A. B.* is now the vendor, but he was not the person selling at the time." There may be precisely that contest of evidence which the *Statute of Frauds* was intended to obviate. That shews exactly the distinction between *Ogilvie* v. *Foljambe* (2) and the present case. In *Ogilvie* v. *Foljambe* a particular house had been referred to as Mr. *Ogilvie's* house in the course of the correspondence which constituted a contract for sale and purchase. Evidence was admitted to shew the position, the size and nature of the subject, because there was a sufficient description of a definite particular thing which had been sold, to allow that explanatory evidence. But in this case there seems no kind of description of that which is sold. There is only the word "property." The word "property" is quite as vague, to my mind, as the word "vendor" was in the case before the Master of the Rolls. It is because of the vagueness of that word that I do not feel myself at liberty to allow parol evidence to be introduced as to what the thing sold at the *Sun Inn* on that day was, about which there may be, for anything I know, a considerable contest. Suppose, for example, the vendor were to say, "I sold at the *Sun Inn* a certain house, certain plant, certain loose materials upon the ground, and I say what I sold were all these things," and he gives a list. Suppose the purchaser says, "I did not buy these things, I did not buy so many," or, "I bought those things and something else." Is not that the danger which the *Statute of Frauds* was intended to prevent? You must have on the face of the contract

20 C D 95

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(1) Law Rep. 18 Eq. 4.

(2) 3 Mer. 53.

a sufficient definite description of the things sold to enable you to introduce parol evidence to shew what the articles were to which that description refers, but a mere description of the things sold as "property" is not, to my mind, sufficiently definite to enable any such parol evidence to be adduced.

There was one other case cited which it is necessary for me to refer to, which seems to me to make the same distinction very plain indeed, the case of *Rossiter* v. *Miller* (1), which went lately to the House of Lords. Lord *Cairns*, then Lord Chancellor, there said (2): "My Lords, the other two points in the case really are very small. As to the use of the term 'proprietors' I own I was somewhat surprised to hear that question argued, for I am sure your Lordships have frequently seen conditions of sale, not merely by auction but by private contract, in which it is stated that the sale is made, sometimes by the owners, and sometimes by the mortgagees, and a form of contract is annexed in which an agent signs for the vendors, and no other specification upon the vendor's part is inserted, and I never heard up to this time that a contract under those circumstances was invalid. In point of fact, my Lords, the question is, is there that certainty which is described in the legal maxim *id certum est quod certum reddi potest?* If I enter into a contract on behalf of my client, on behalf of my principal, on behalf of my friend, on behalf of those whom it may concern, in all those cases there is no such statement, and I apprehend that in none of those cases would the note satisfy the requirements of the *Statute of Frauds*. But if I, being really an agent, enter into a contract to sell *Blackacre*, of which I am not proprietor, or to sell the house No. 1 *Portland Place* on behalf of the owner of that house, there, I apprehend, is a statement of matter of fact, as to which there can be perfect certainty, and none of the dangers struck at by the *Statute of Frauds* can arise."

There Lord *Cairns* drew the distinction between the words "proprietor," "mortgagee," and the like, and "my client," "my principal," and "my friend." Why cannot "my client," "my principal," and "my friend" be made just as certain if you introduce parol evidence as "the owner" or the "mortgagee"? There is no doubt it can; but the reason for the distinction I take to be this: that in the one case you have a description of the individual more or less definite, and in the other you have none. "My client" is not a description of any individual necessarily. "My friend" is not a description of an individual *A. B.*; and in the one case you may have parol evidence to render the description more certain, but in the other you may not, because you do not find, on the face of the contract, a sufficient description in writing to enable you to introduce the parol evidence.

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(1) 3 App. Cas. 1124.

(2) 3 App. Cas. 1140.

I am not disposed to carry the law on this subject one hair's breadth beyond the decided cases, and I think I should be doing so if I were to hold that in this contract there is a sufficient description of the property. I hold that the only documents in writing to which I can refer are the receipt and the conditions, and the memorandum signed at the bottom of them, and I hold upon the authority of *Long* v. *Millar* (1), that in those two documents taken together there is not a sufficiently definite description of the property sold and purchased to enable me to receive parol evidence of what the subjects of that sale and purchase were. Having come to that conclusion, I am bound to dismiss this action, as I do, with costs.

Solicitors: *Berry & Binns; Stevens & Co.*

(1) 4 C. P. D. 450.

T. W. G.

KAY, J.

1881

May 26.

SEAGRAM *v.* TUCK.

[1880 W. 3566.]

Receiver—Debt of Record—Trustee—Statute of Limitations.

Money not accounted for and due from a receiver under the Court is, by his recognizance, made a debt of record, although the balance due has not been ascertained.

The receiver is a trustee of such money for the persons entitled thereto, and cannot, as against them, avail himself of the *Statute of Limitations*, although his final accounts have been passed and the recognizances vacated.

JOHN CHARLES WOOD was, by an order made in the suit of *Walters* v. *Walters*, appointed receiver to get in the personal estate of *Ralph Walters*, deceased, and thereupon entered into the usual recognizances. In the year 1870 *Wood* sold £600 *Great Eastern Railway* Stock and certain small sums of debenture and preference stock, part of the estate of *Ralph Walters*, and received the proceeds, amounting to £357. In 1873 his accounts as receiver were passed, this sum not appearing in them. *Wood* died in 1876, and by an order dated the 9th of June, 1877, his then personal representatives were ordered to carry in and pass his eighth, ninth, and final accounts, and to pay into Court the balances found due; and it was ordered that upon such payment being made, the recognizances entered into by *Wood* and his sureties be vacated. The accounts were accordingly brought in, not including the £357, and were passed, and the recognizances were vacated. It was stated that the Plaintiff in *Walters* v. *Walters* was the only party to the suit who attended, or would have been allowed to attend, the passing of the accounts, and that this was now the settled practice in Chambers.

In 1880 it was discovered that the £357 had never been brought into account, and this action of *Seagram* v. *Tuck* was then brought by *John Seagram*, the then legal personal representative of *Ralph Walters*, on behalf of himself and all the other unsatisfied creditors of *Wood*, against *W. H. Tuck*, the legal personal representative of *Wood*, and *W. C. L. Tuck*, to whom certain real estate of *Wood* had descended, praying administration of his personal estate and real estate.

The Defendants pleaded the *Statute of Limitations*, and that the Plaintiff was barred by laches and acquiescence.

This was the hearing of the action. Witnesses were examined to prove the appropriation by *Wood* of the £357, and it appeared that the country solicitors and some of the parties in *Walters* v. *Walters* must have been aware that the stock had been sold. The orders made as to the passing of the accounts appeared to be the only part of the proceedings in *Walters* v. *Walters* before the Court.

Higgins, Q.C., and *Fellows*, for the Plaintiff:—

On the question of the *Statute of Limitations, Wood* was agent for the parties entitled to the money, and his representatives cannot avail themselves of the statute: *Burdick* v. *Garrick* (1). The Plaintiff could not have discovered the omission. It is not a case of an account being taken, but of an agent in a fiduciary character: *Teed* v. *Beere* (2); *Hardwicke* (*Earl of*) v. *Vernon* (3). Besides, money due from a receiver is a judgment debt, whether a balance has been found or not: *Seton* on Decrees, 4th Ed. p. 426 (4).

Oswald, for the personal representatives of *Wood*:—

The debt was incurred in 1870 and the accounts were passed in 1873; this action was not brought until 1880, so that the claim is barred by the lapse of time.

There is no fraud in this case and no express trust, nor is there any allegation of any trust: *Rolfe* v. *Gregory* (5). The Plaintiff in *Walters* v. *Walters* may have been ignorant of the sale, but it does not follow that the other parties interested were so, and in fact they must have known it: *Townshend* v. *Townshend* (6); *Dean* v. *Thwaite* (7); *Beckford* v. *Wade* (8).

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(1) Law Rep. 5 Ch. 233.

(2) 28 L. J. (Ch.) 782.

(3) 14 Ves. 504.

(4) The case mentioned in 1 Set. 4th Ed. p. 426, is *Englehart* v. *Odell.* The Registrar's book was referred to, from which it appeared that the proceeding in that case was on the recognizance given by the receiver in pursuance of the order by which he was appointed.

(5) 13 W. R. 355. 11 Jur. N.S. 98. 4 De G. J. & S. 576

(6) 1 Bro. C. C. 550.

(7) 21 Beav. 621.

(8) 17 Ves. 97.

Haughton, for the heir:—

The accounts have been regularly passed and the recognizances have been vacated, and if such an action is allowed when will a receiver be free? There was no fiduciary relation between the parties and the receiver, who was merely an officer of the Court, and is liable to the Court only. His duty was simply ministerial, and he gives security to the Court, not to the parties. He is in the same position as a registrar or master. There can be no debt of record until a balance is found.

Higgins, in reply:—

The allowance of the accounts does not amount to an admission that nothing more is due from the receiver. If we had applied by summons in the old suit, we should still have had to bring this action and cause double expense: *Ludgater* v. *Channell* (1). The statute could not run until the final account was taken. No one knows whether the omission of this money was intentional or not, and it makes no difference.

Kay, J., after stating the evidence as to the sale of the stock and the receipt by *Wood* of the proceeds, and stating the manner in which the present Plaintiff claimed against the Defendants, continued:—

I am satisfied that *Wood* did receive these sums of money, and did not account for them. They are, therefore, undoubtedly still due from his estate. But then it is said that the *Statute of Limitations* ought to prevail as a defence. Now the final order for passing the accounts and vacating the recognizances was made on the 9th of June, 1877; the recognizances were, therefore, in existence at that time and for some time afterwards, because the recognizances could not have been vacated until the balance had been paid into Court. I have not the exact date when that was done, but it must have been after June, 1877. I was referred to a statement in 1 *Set.* Decr. 4th Ed. p. 426, on the authority of a case that the balance due from a receiver, though his accounts had never been passed, is a debt of record. This is a very meagre statement of the case, and, on referring to the Registrar's book,

(1) 3 Mac. & G. 175.

it appeared that the reason why the debt was held of record was that the petition there was presented on the recognizance of the receiver, and the order made shews that the reason was the existence of the recognizance. Therefore it is obvious that in this case also every sum of money due from the receiver, whether an ascertained balance or not, as long as the recognizance existed, would be a debt of record, so that until June, 1877, this was a debt of record due from the receiver.

That would be one answer to the plea of the *Statute of Limitations*; but if that answer is not available by reason of the recognizances being vacated, I should be strongly inclined to hold that as to any money due from a receiver and not brought into account, either through mistake or through fraud, he would be a trustee for the persons entitled to that money. It is important to hold the position of a receiver to be one in which liability to account would not easily be barred, and so long as he was living he must be held to have been a trustee of the money. Therefore, in whichever way it is taken, whether the debt is held to be of record or to be due on a trust, either would be an answer to the defence of the *Statute of Limitations.*

His Lordship then gave judgment for administration of *Wood's* estate; but his Lordship was of opinion that there must have been great negligence in allowing the accounts to be passed without noticing the omission, and allowed no costs up to the hearing.

Solicitors for Plaintiff: *Stibbard, Gibson, & Co.*
Solicitors for Defendants: *Webb, Stock, & Burt.*

C. M.

C. A.
1880
V.-C. H.
June 12, 19, 26.
C. A.
1881
May 19.

20 ChD 5.
31

In re KNAPMAN.
KNAPMAN *v.* WREFORD.

[1879 K. 14.]

Set-off—Executor—Administration—Costs incurred in Probate Suit against Legacy.

Legatees, who were also next of kin of the testator, brought an action against the executor, seeking a revocation of the probate, but failed, and were ordered to pay the executor's costs of the action. While the action was pending, some of the Plaintiffs assigned and others mortgaged their shares whether under the will or on an intestacy. Afterwards, the legatees commenced an action against the executor in the Chancery Division for the administration of the estate:—

Held (affirming the decision of *Hall*, V.C.), that the executor was entitled to set off the costs in the probate suit against the legacies, notwithstanding the assignments and incumbrances.

W. S. *KNAPMAN*, by his will, dated the 8th of February, 1877, gave £2000 to his lawful nephews and nieces to be equally divided between those who were living at his decease; and gave the residue of his real and personal estate to *Ann Wreford*, whom he appointed his sole executrix. The testator died on the 14th of December, 1877, and his will was proved by the executrix on the 5th of January, 1878. The nephews and nieces were the next of kin.

On the 14th of March, 1878, Mrs. *De Vine*, wife of *C. De Vine*, being a niece of the testator, commenced an action in the Probate Division against the executrix, claiming a grant of administration and to have the probate revoked. Mrs. *Spendlove*, another niece, also a married woman, was afterwards joined as co-Plaintiff; and by an order of the 17th of December, 1878, *H. T. Knapman*, a nephew, and Mrs. *Hewitt* and Mrs. *Sparkes*, nieces of the testator, who were both married women, had liberty to intervene as Plaintiffs. On the 7th of February, 1879, judgment was given for the Defendant, the executrix, affirming the will.

On the 1st of March, 1879, *H. T. Knapman*, Mr. and Mrs. *Hewitt*, and Mr. and Mrs. *Sparkes*, commenced the present action against the executrix for the administration of the estate. Thereupon the Defendant applied for an order to pay the £2000 legacy into Court, submitting that she had a right to be paid the costs of the action in the Probate Division, which had not been yet taxed, out of the legacy; and asking for a stop order on the shares of Mr. and Mrs. *De Vine*, Mr. and Mrs. *Spendlove*, *H. T. Knapman*, Mr. and Mrs. *Hewitt*, and Mr. and Mrs. *Sparkes*. On the 2nd of April the order was made for payment into Court, reciting the claims for costs and giving a stop order for them, and at the same time inquiries were directed as to the persons entitled to the legacy.

The Defendant's costs were afterwards taxed in the probate action, and on the 1st of August, 1879, an order was made in that action that the Plaintiffs and interveners should pay to the Defendant's solicitors £471 5*s.* 4*d.*, and the Plaintiffs a further sum of £40 8*s.* 4*d.*, making the amount of the Defendant's costs so taxed.

An order was then obtained by the executrix in the action in the Chancery Division, charging the shares of the Plaintiffs and the two other nieces, Mrs. *De Vine* and Mrs. *Spendlove*, with the amount of the costs; but the charging order was afterwards discharged as to the shares of the married ladies, on the application of the mortgagees of the shares, who claimed to have incumbrances prior to the Defendant.

The Chief Clerk, by his certificate, found that ten persons had made out a claim to be nephews and nieces of the testator. Mrs. *De Vine's* and Mrs. *Spendlove's* shares under the will had been assigned to Messrs. *Yorke & Brewer*, and the shares of Mrs. *Sparkes* and Mrs. *Hewitt* were also incumbered, and *H. T. Knapman's* share was mortgaged to Messrs. *Hildreth & Ommaney*.

All these incumbrances were created after the institution of the action in the Probate Court, but before the 1st of August, 1879, when final judgment was given.

The case came on for further consideration before Vice-Chancellor *Hall* on the 12th of June, 1880, and on a summons by the Defendant claiming to set off the costs in the probate suit against the shares of the four married ladies and *H. T. Knapman*.

J. Beaumont, for the Plaintiffs, and

Hastings, Q.C., and *Beaumont*, for Messrs. *Yorke & Brewer*:—The right to set off, claimed by the summons, is not inherent, and it was disposed of by the payment of the fund by the Defendant into Court, as that proceeding was an acknowledgment of the Plaintiffs' right, and there was no reference to any right claimed by the Defendant. But there can be no right of set-off here, for another reason, viz., that some of the parties against whom the Defendant seeks to make the claim—the husbands—were not parties to the judgment pronounced in the Probate Division. That action so far as it was by married women was upon their responsibility, and could not bind the husbands or their assignees. The claim of the Defendant should therefore be disallowed.

Borthwick, for Messrs. *Hildreth & Ommaney*, submitted that the executrix, if entitled to her costs, should be paid them out of the general estate. That was her only right.

W. Pearson, Q.C., and *W. W. Karslake*, for the Defendant, the executrix:—

Under Rules of Court, 1875, Order LV., the costs of all proceedings are to be in the discretion of the Court; but nothing therein contained was to deprive a trustee of any right to costs out of a particular estate or fund to which he would be entitled according to the rules formerly acted upon in Courts of Equity. The Defendant, whose costs in the action against her in the Probate Division were ordered to be paid, is entitled to have them paid out of the shares of the Plaintiffs paramount to everybody claiming under them, whether as assignees or mortgagees. All those incumbrances must be considered as subject to the judgment in the probate action.

The payment of the fund into Court to an account of the nephews and nieces was in no sense a payment to the Plaintiffs of any part of it, but was merely a proceeding for the safe custody of it. The fund, as between the Plaintiffs and the Defendant, remained precisely in the same position as if it were now in her possession. As to the right of set-off, formerly the rule was not to allow costs in an action at law and costs in a suit in equity to be set off, as it was considered that it would not be fair in regard to the successful party's solicitor's lien, but under the new practice, and looking at the facts of these actions, in which the parties and the solicitors are the same, no difficulty of a serious character can arise. The Defendant is in the same position under the *Judicature Act* as if there had been two suits in the Court of Chancery under the old practice. The right of set-off should be allowed both as against the Plaintiffs and their assignees, and as against the other shares, and this right is not affected by any lien of their solicitors.

[They referred to *Mercer* v. *Graves* (1); *Robarts* v. *Buèe* (2); *Wright* v. *Mudie* (3), *Collett* v. *Preston* (4), *Lee* v. *Pain* (5), *Smith* v. *Parkes* (6), and *Morgan & Davey* on Costs (7).]

Beaumont, in reply.

HALL, V.C. :—

This is a case of considerable importance. The question is what is the proper mode of dealing with the costs ordered to be paid by the Judge of the Probate Court. Those costs are all on the same footing as regards the parties liable to pay them, with the exception of a small sum of £40 8*s.* 4*d.*, which is made payable by Mrs. *De Vine* and Mrs. *Spendlove*, as they were incurred by them before the interveners came in. There is no distinction between Mrs. *De Vine* and Mrs. *Spendlove*, though the latter was not a party to the action when it was commenced. Her name was added as a plaintiff. She has been treated as being in the same position as regards the costs of those proceedings as Mrs. *De Vine*; thus the £40 8*s.* 4*d.* was treated as payable by them, and that sum was distinguished from the other costs in the Probate action, which were ordered to be paid by all the parties to those proceedings. The testator died in 1877, and his will was proved on the 5th of January, 1878. The action to revoke probate was commenced on the 14th of March, 1878. It was begun, if it be material, before any one of the assignments executed by these parties. I have not seen the documents, but I suppose they are assignments of the legacies and of the shares as next of kin, if the assignors should succeed in the action. In the view which I take, it does not make any difference whether the assignments were of shares in the £2000 legacy, or of shares as next of kin. Nothing, in my judgment, turns upon the dates of the assignments which were made. In one case, that of *Thomas Knapman,* the assignment was of the legacy, and not of the share of the residue.

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(1) Law Rep. 7 Q. B. 499.
(2) 8 Ch. D. 198.
(3) 1 S. & S. 266.
(4) 15 Beav. 458.
(5) 4 Hare, 255.
(6) 16 Beav. 115.
(7) Pages 93, 397.

The parties having made those assignments, some absolutely, some by way of mortgage in the first instance, and then absolutely of the equities of redemption, the order was made for the payment of the costs in the probate proceedings, and then the action in this Court was brought for the administration of the estate. The action in this Court would have gone on in the ordinary course, the order being to take all the accounts for the purpose of applying the assets. In applying the assets one thing is plain—that provision must be made for paying all the expenses of the legal personal representative out of them. Supposing there had been nothing but the legacy in question, and only assets enough to pay that legacy without any residue, it is plain that the assets must have gone to pay the executrix's costs, charges, and expenses. The executrix is entitled to her expenses out of all and each and every part of the assets. Therefore, every person who takes an assignment of a legacy from a legatee, takes it subject to there not being assets to satisfy it, from different causes, it may be from loss incurred with reference to the estate, or from the estate not proving sufficient, or from its being exhausted, or having to be resorted to for the payment of the costs of administration. The assignee takes it subject to the risk, and it makes no difference for that purpose whether the executrix, who has the right to be paid her expenses, is an executrix and also residuary legatee. The assignment is necessarily so subject. There are other infirmities with reference to a person taking an assignment of a legacy; for instance, the infirmity of the legatee happening to be indebted to the estate, and that even though the debt be barred by the *Statute of Limitations.* Neither the legatee nor any person claiming under the legatee can claim anything until the debt be satisfied. That is quite plain. The assignees therefore have taken in this case, unquestionably, whether they were parties to the proceedings in the Probate Court or not, subject to the risks in respect of the liabilities of the particular legacies assigned to them.

The executrix in this case has been put to certain expenses which have not been paid, but which must be paid somehow or another. Nothing has taken place here which deprives, as I consider, the executrix of her right to say, "I have a right to resort to the assets for the payment of those expenses." The payment into Court, it was contended, had that operation, but that payment was manifestly made for the purpose of rendering it unnecessary to incur further expenses in the administration of the assets through the medium of the Court. It was the payment in of a sum sufficient to answer the legacy, but there was inserted in the order the claim made to be paid the costs of the probate action out of the fund. That was expressly mentioned in the affidavit under which the money was paid in, and the order expressly gave the party paying it in a stop order upon the fund. It was not to be paid out without notice. I do not consider that under the circumstances there has been anything done which deprives the executrix of the right to be paid, as her expenses of administration, the expenses incurred in the probate action. Nothing has occurred to deprive her of that right, if it be a proper claim made by her against the fund, as it was, and still remains, part of the assets of the estate liable to pay her expenses. If it be part of the assets liable to pay her expenses, when I am providing for the costs in the administration action I must see that the executrix is in this action cleared, as regards her expenses, if she has, under the circumstances, not given up all claim against the particular fund in respect of her expenses. I do not think she has given it up, if it would be a right thing to resort to the fund, irrespective of the payment into Court. Then it may be said that as between the fund and the other assets of the testator, the former ought not to be resorted to, because it is the legatees' fund, and the expenses of the litigation, to which the husbands were not parties, ought not to be treated as properly payable out of the fund. The argument, of course, would be that those costs ought to be paid out of some other fund. But if there had been other legacies to be paid, or if they were to be paid out of the other assets available for the payment of those other legacies, the effect of it might be either to leave those legacies unpaid, or to lead to their abatement in

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respect of payment. Ought they to be paid out of the residuary estate? Why should the residuary estate, by the litigation in respect of which the residuary legatee is in no way to blame, be diminished, as it would be diminished, if it were resorted to by reason of claims made in the administration by persons who eventually come in, to be entitled to be paid legacies subject to any claim there may be against them? It seems to me that as between the different persons, residuary legatees and these legatees, or general legatees, the equitable course of administering the assets is to direct that those persons are not to receive their legacies until the assets of the testator are put in the position of not being diminished by expenses occasioned by those legatees. Although those expenses have been so occasioned, not under a claim to the legacies, but a claim to part of the estate, ignoring the legacies, still they are occasioned by legatees. The legatees are claiming to receive a benefit under the will, and notwithstanding that by their course of conduct they have diminished the assets out of which the legacies are to be paid. It seems to me that it would be a very strong thing to say that that should be allowed. It is not disputed that if the legatees had diminished the assets by any conduct on their part in the testator's lifetime, either by being indebted to him or otherwise, they must make them good. Can they be in a better position if they diminish the assets subsequently to his death, but before the estate has been administered and distributed? Certainly not. Individually the legatees cannot be allowed to take anything, as I conceive, out of the assets of the estate, without making good to the estate that which has been improperly taken out of it by them, by paying the executrix's expenses. The executrix has had to resort to the very estate which is to pay the legacies to satisfy her own expenses, and still they say, "Pay us our legacies and we will not pay back those expenses." That seems to me to be most inequitable; and as regards the legatees themselves, I cannot conceive there can be a question that they must be in the position of not being able to claim one farthing, without making good that liability to the assets and to the estate. Then the only question is whether the persons who have claimed by mortgages or absolute assignments from them are in any better position? They have taken their

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mortgages and their absolute assignments, subject always to the ultimate administration and distribution of the estate. They have taken assignments of that which, in the proper administration of the estate, the proper assignment of expenses as between different persons taking parts of the estate under the will, is subject to the proper adjustment of all expenses of administration.

The proper adjustment of the expenses seems to me to require that expenses incurred by the executrix, so far as they are expenses of administration occasioned by the acts and conduct of the legatees, should be treated as proper deductions from the legacies. Otherwise it might be that if there were no assets other than those to pay the expenses, the strange anomaly would arise that the executrix, though she has been put to expenses by persons claiming under the will, is not to have them paid, but she is to pay the legacies in full. It seems to me to be not going further at all in principle than the ordinary case, which is that every person taking an assignment from a *cestui que trust* of a portion of the testator's estate, at all events takes it subject to the liability to make good all breaches of trust on the part of the assignor if he fill the fiduciary position of a trustee, even though the breaches of trust be subsequent to the assignment, as in *Morris* v. *Livie* (1), and cases of that class. They take subject to all those risks. I think they must, upon an analogous principle, take subject to the risk of the legacy assigned not being properly payable to the extent to which the legatee is liable to make good to the estate expenses incurred in an administration of the estate, that is, the loss occasioned to the estate by reason of expenses incurred in the administration of the estate by the residuary legatee. It seems to me, following out the principle and applying it to this case, the result is that each person who takes a share of the £2000, and whom for this purpose I treat as a separate legatee of so much money, and each person claiming a marital right in respect of some of these legacies (which right I cannot suppose is higher than that of the other parties—it may be lower) each of these persons is, in respect of the legacy to the person in whose right the claim is now made out of the fund, liable to satisfy the costs ordered to be paid by the original legatee; the legacy of each person must stand as liable

(1) 1 Y. & C. Ch. 380.

to pay those costs. The result of that is that the £40 8*s.* 4*d.* must only be borne by the legacies of Mrs. *De Vine* and Mrs. *Spendlove.* The legacies of the other persons who are ordered to pay costs will be liable, together with Mrs. *De Vine's* and Mrs. *Spendlove's* legacies, to pay the other sum, £471 5*s.* 4*d.* The different legacies will all be applicable to pay that amount. So far as the executrix is concerned, the whole fund will be applicable to pay that amount. As between the different persons and their legacies, that apparently will have to be distributed in fifths, so that each will have to bear one-fifth. Then the remainder of the fund will be distributed amongst the different persons, each of these five shares being reduced by one-fifth of this amount. Next, as regards the general costs of the suit, I hold that all parties, other than the Defendant, are entitled to be paid their costs of it as an administration suit. There is nothing to deprive them of their costs. Assets being admitted by the executrix for the purpose, of course she must pay the parties what they are entitled to for costs. There are eleven persons entitled to shares, and they—each one of the *cestuis que trust,* because I look upon the separate legatees as separate *cestuis que trust*—will get a set of costs in respect of each share and only one set of costs.

I think that it is not necessary for me to determine the point which was raised by Mr. *Pearson* with regard to set-off of what I may call common law costs and equity costs. There might be something found in the rules upon costs which might have a bearing upon the question whenever it becomes necessary to determine it.

Declare that the respective eleventh shares of the Plaintiffs *H. T. Knapman, E. T. Hewitt, M. E. Sparkes, E. De Vine,* and *F. Spendlove,* are jointly and severally liable to make good to the Defendant £471 5*s.* 4*d.*, the amount of costs ordered by the Probate Court to be paid by them to her solicitors; and that the respective eleventh shares of the said *E. De Vine* and *F. Spendlove* are also jointly and severally liable to make good to the Defendant the £40 8*s.* 4*d.*, the further amount of costs ordered by the Probate Court to be paid by them. Tax as between party and party the costs of the Plaintiffs of this action and the costs of the parties, if any, who have obtained liberty to attend the proceedings and have attended accordingly, and the costs of the hearing of *Hildreth & Co.*, but only one set of costs is to be allowed to the Plaintiffs and their respective incumbrancers, and one set of costs only in respect of each share of the other parties and their incumbrancers, and the Defendant admitting assets, order her to pay such costs when taxed. Divide the fund into eleven shares, and out of the respective five eleventh shares of the Plaintiffs and *E. De Vine* and *F. Spendlove* pay to the Defendants' solicitors the costs ordered by the Probate Court, and pay the residue of such shares to the parties entitled, and pay and carry over the said six eleventh shares.

From this order the Plaintiffs and the incumbrancers on the shares of the other nieces appealed. The appeal was heard on the 19th of May, 1881.

Beaumont (*Hastings*, Q.C., with him) for the Appellants.

Borthwick, for the incumbrancers on *H. T. Knapman's* share.

W. Pearson, Q.C., and *W. W. Karslake*, Q.C., for the Defendant, were not called on.

JESSEL, M.R. :—

I am of opinion that the order of the Vice-Chancellor is entirely right. Certain legatees instituted a suit in the Probate Division seeking to recall the probate. They failed, and by the final judgment in that action the Plaintiffs are made liable to pay a share of the costs to the executrix, which she is therefore entitled to recover as money due to the testator's estate. Pending the litigation, but before the final judgment, the legatees assigned their share to mortgagees. It appears to me that the mortgagees took subject to the suit, and the result being that the Plaintiffs' claim was bad, and that the Plaintiffs were liable to pay the Defendant's costs, that liability is paramount to the right of the incumbrancers. That being so, an action in the Chancery Division was commenced for the administration of the estate. The executrix says there are sufficient assets to pay the legatees, but she claims to deduct the costs which the legatees have to pay from the legacies, on the principle that the legacy ought not to be paid while anything is due to the testator's estate from the legatee. I think her contention is right, and that the legatees have no right to receive anything from the estate without accounting for all that is due.

It is said that the Vice-Chancellor decided another way when he discharged the charging order. That order was discharged because there had been an assignment of some of the shares.

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But there was really no occasion for a charging order. The Vice-Chancellor is bound to give effect to the rights of the executrix before dealing with the fund. The decision appealed from is good equity and good sense.

JAMES and LUSH, L.JJ., concurred.

Solicitors: *Day & Cather; J. E. Fox & Co.*, agents for *R. E. Bishop, Torquay; C. F. Yorke; E. W. Reeves.*

T. F. M.
M. W.

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In re CAMPDEN CHARITIES.

Charity—Cy-près—Scheme by Charity Commissioners—Eleemosynary Gift—Apprentice Fees—Application to Education—Discretion of Commissioners—Appeal.

A sum of money was given by a testatrix in 1643 to be laid out in the purchase of lands of the annual value of £10, one half to be applied towards the better relief of the most poor and needy people of good life and conversation in the parish of *K.*, to be paid to them half-yearly in the church or the porch thereof: and the other half to apprentice one poor boy or more of the parish. At that time *K.* was a small village, but it had now increased to a large and wealthy town, and the income of the charity estate had increased to more than £2000.

The Charity Commissioners settled a scheme by which they appropriated the income to the following objects: (*a*) The relief of poor deserving objects of the parish in case of sudden accident, sickness, or distress. (*b*) Subscriptions to dispensaries and hospitals in the parish. (*c*) Annuities for deserving and necessitous persons who had resided seven years in the parish. (*d*) The advancement of the education of children attending elementary schools. (*e*) Premiums for apprenticeship and outfits for poor boys of the parish. (*f*) Payments to encourage the continuance of scholars at public elementary schools above the age of eleven years. (*g*) Exhibitions at higher places of education. (*h*) Providing lectures and evening classes.

Some of the parishioners objected to the application of the income to educational purposes:—

Held (reversing the decision of *Hall*, V.C.), that, considering the enormous increase of the income of the Charity and of the population of the parish, and the change of the circumstances and habits of the people, the application of the income of the charity *cy-près* to educational and other charitable purposes was justifiable, and that the scheme of the Charity Commissioners ought to be confirmed.

A long-continued unauthorized *cy-près* application of charity funds by the

See also case on same charity In re Campden Charities 24 Ch. D. 213. Chitty J.

trustees is no ground of objection to a scheme of the Charity Commissioners directing a different *cy-près* application.

The Court of Appeal will not interfere with the details of a scheme of the Charity Commissioners, unless they have exceeded their authority or the scheme contains something wrong in principle or wrong in law.

BY his will, dated the 12th of October, 1629, *Baptist* Viscount *Campden* bequeathed a sum of £200 "to be yearly employed for the good and benefit of the poor of the town of *Kensington* for ever, in such manner as the Right Honourable *Edward* Lord *Noel* and Sir *W. Blake* and the churchwardens of the said parish of *Kensington* from time to time shall think fit to establish for ever."

This legacy was expended in the purchase of an estate at *Shepherd's Bush*, called *Shearcrofts*, which was conveyed to trustees upon the trusts of the will.

By her will, dated the 14th of February, 1643, *Elizabeth* Viscountess *Campden* bequeathed to Sir *John Thorowgood* and the churchwardens of *Kensington*, and others, a sum of £200 upon trust to purchase lands of the clear annual value of £10, "one half of which should be applied from time to time for ever for and towards the better relief of the most poor and needy people that be of good life and conversation that should be inhabiting within the said parish of *Kensington*, and the other half thereof should be applied yearly for ever to put forth one poor boy or more, being of the said parish, to be apprenticed. The said £5 due to the poor to be paid to them half-yearly for ever, at Lady-day and Michaelmas, in the church or the porch thereof at *Kensington*."

This legacy was invested in the purchase of an estate in the the parish of *Kensington*, known as *Butt's Field*, which was conveyed to trustees upon the trusts of the will.

By deed of feoffment, dated the 18th of June, 1651, an estate containing two acres, situate at the *Gravel Pits*, in the parish of *Kensington*, and since commonly known as *Cromwell's Gift*, was conveyed to twelve parishioners of *Kensington*, some of whom were the same as some of the trustees of the other deeds, but no trust was declared, nor was any mention made of the parties by whom the purchase-money of £45 was paid, but tradition had ascribed the gift to *Oliver Cromwell*.

By indentures of lease and release of the 2nd and 3rd of June, 1757, the three estates of *Shearcrofts, Butt's Field*, and *Cromwell's Gift*, were vested in trustees upon trust that they should from time to time let them for the most yearly profit and benefit that they conveniently could, and should yearly dispose of the rents and profits for the use and benefit of the poor of good life and conversation of the town and parish of *Kensington* from time to time for ever, and as to one quarter of the said rents and profits for the putting out one or more boy or boys of the said parish apprentice or apprentices according to the true intent and meaning of the last wills and testaments of the said Lord and Lady *Campden;* with a provision for appointing new trustees who were to be honest and substantial parishioners of the parish of *Kensington.*

In the 17th year of *George* III. an Act was passed for regulating, among other things, the management of the Charity estates, but the general scheme of the application of the rents and profits was not substantially interfered with.

In process of time the population of the parish of *Kensington* and the income of the Charity estates increased very considerably.

At some time previous to the year 1852 the several district parishes of *Holy Trinity Brompton, St. John Notting Hill, St. James Norland, St. Mary's West Brompton*, and *St. Barnabas*, were separated from *St. Mary Abbotts*, and made separate district parishes.

By an order of the High Court of Chancery, dated the 23rd of December, 1852, on a petition of the incumbent and churchwardens of *Brompton*, it was declared that the estate known as *Cromwell's Gift* should be considered part of Lord and Lady *Campden's* estates, and that the net rents and profits of the whole estates, which were therein referred to as the *Campden Charity* estates, should be apportioned between the five district parishes and the remainder of *St. Mary Abbotts* in certain proportions; and it was ordered that the trustees for the time being of the *Campden Charity* estates should apply the net rents and profits as they had been accustomed to do, but in the proportions aforesaid (1).

The total rents of the Charity estates now amounted to about

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(1) See *Ex parte Incumbent of Brompton*, 5 De G. & Sm. 626.

£3600, of which about £2200 proceeded from the lands subject to *Lady Campden's Charity*.

In the year 1878 the Charity Commissioners prepared a draft scheme for the administration of the charity. This scheme was afterwards amended to meet some of the suggestions of the trustees, and was finally settled on the 23rd of July, 1879. The following were the principal provisions of the scheme:—

The Commissioners proposed that the trustees should consist of eighteen persons, of whom three were to be *ex officio* trustees, namely, the vicar and churchwardens of *St. Mary Abbotts*, six representatives elected by the vestry the board of guardians and the members of the *London* School Board for *Chelsea*, and nine co-optatives.

That after providing for the apprentice fees and premiums already granted, the trustees might apply a portion of the residue of the clear income not exceeding in any year one moiety of such residue for the following purposes, or some of them:—

(*a.*) An amount not exceeding £200 for the relief or assistance of poor deserving inhabitants of the said parish in case of sudden accident, sickness, or of exceptional loss or distress;

(*b.*) An annual sum not exceeding £300 in subscriptions or donations in aid of any dispensary, infirmary, hospital, or institution, whether special or general, for the cure of the sick or afflicted, or for providing trained nurses of which, or of the services of whom, the poor inhabitants of the parish might receive the benefits;

(*c.*) An annual sum not exceeding £600 in the payment of pensions in conformity with the conditions thereinafter contained to deserving and necessitous inhabitants of the parish who should have resided therein for not less than seven years, and who should not have received poor law relief, and who from age, ill-health, accident, or infirmity should be unable to maintain themselves;

(*d.*) The residue of the said moiety to be applied so as to encourage the formation of provident habits, in contributions towards the purchase of annuities, either present or deferred, and in aid of income or other means of support possessed by the recipient, which shall be proved to have been produced by his own exertions and prudence.

As to the other moiety of the clear income, together with so much of the first moiety as might not be applied as before directed, it was to be applied in the advancement of the education of children resident in the parish who attend or have attended any public elementary school as defined by the *Elementary Education Act*, in one of the following ways:—

(*a.*) In premiums by way of apprenticeship or suitable outfits for poor boys of the parish, or other help and advancement to assist them on entering on the duties of life.

(*b.*) In payments not exceeding £6 each, to encourage the continuance of the attendance at school for children above the age of eleven at elementary schools.

(*c.*) In payments of exhibitions not exceeding £30 each tenable for a period of three years at higher places of education, or at places of technical or professional education, or as public teachers.

(*d.*) In providing lectures or evening classes for the benefit of scholars who have attended elementary schools.

There was also power to make payments for the instruction of deaf and dumb children.

Some of the parishioners objected to this scheme, chiefly on the ground that it diverted to educational purposes a large portion of the income which was originally given for, and had always been devoted to, eleemosynary objects: and they now petitioned for an order to annul the order and alter the scheme of the Charity Commissioners, producing evidence that there was no lack of deserving objects of the charity ready to take under the old mode of applying the income.

The petition was heard before Vice-Chancellor *Hall* on the 19th of July, 1880.

Hastings, Q.C., and *F. A. Lewin*, for the Petitioners:—

By this scheme the Charity Commissioners have in substance diverted an eleemosynary gift to educational purposes, and this is a variation of the nature of a charity which will only be permitted where it is clear that the original purpose of the founders cannot be attained or carried out, which is not the case here: *Attorney-General* v. *Whiteley* (1); *Attorney-General* v. *Governors of Sher-*

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(1) 11 Ves. 241.

borne School (1); *Attorney-General* v. *Boucherett* (2); *Philpott* v. *St. George's Hospital* (3); *In re Lambeth Charities* (4); *In re Stane's Will* (5).

In the *Bishop of Hereford* v. *Adams* (6), which may be claimed as an authority by the other side, the bequest was applied upon the principle of the *cy-près* doctrine, the fund being more than sufficient for the original purpose of "provision, physic, or cloaths;" and the proposed application was, in the opinion of Lord *Eldon*, "agreeable to the true construction of the testator's will."

If it is said that the language of *Lord Campden's Gift* is in general and undefined terms, so that educational purposes are not inconsistent with it, the answer is, that long-continued usage limits and defines the construction to be put upon a charitable trust: *Attorney-General* v. *Parker* (7); *Attorney-General* v. *Smythies* (8). And as to *Cromwell's Gift*, the origin of which cannot be traced, usage has in like manner long since conclusively established the trusts on which it must be held, that is to say, half in the same manner as *Lord Campden's*, and the other half in the same manner as *Lady Campden's Charity*. As to *Lady Campden's Gift*, the scheme goes beyond and is inconsistent with its terms. Her intention is clearly expressed that one half of the charity should be distributed in individual relief in the form of doles, and the other half in apprenticing poor boys. Neither of those objects are secured by the scheme, although the apprenticing of the children of the poor is a purpose which the Court would select even if it had not been specified: *Attorney-General* v. *Bovill* (9).

Again, the scheme totally ignores and cannot be worked in conformity with the order of 1852. It attempts to deal with these charities as one charity, although they have been in fact formed into six separate charities by the apportionment effected by that order. It is not within the power of the Commissioners to take a charity away from *Holy Trinity Brompton*, for instance, and to give it to *St. John Notting Hill*, nor (to take another instance)

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(1) 18 Beav. 256. 18 Jur 834
(2) 25 Beav. 116.
(3) 27 Beav. 107. 5 Jur N.S. 664
(4) 22 L. J. (Ch.) 959.
(5) 21 L. J. (O.S.) 261.
(6) 7 Ves. 324.
(7) 1 Ves. Sen. 43.
(8) Keen, 289, 307; 2 Russ. & My. 717; 2 My. & Cr. 135.
(9) 1 Ph. 762.

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can the sum of £300 mentioned in the 24th clause of the scheme be apportioned. Again, under the new scheme the trustees have no power to apply more than £600 per annum in pensions, whereas there was previously no limit as to the amount which might be applied for eleemosynary purposes. Another objection is that the scheme does not require all the trustees to be resident in the parish.

The scheme, then, being defective, for disregard of the terms of the founder's gift, there is no doubt as to the jurisdiction of the Court to alter it upon petition: *Attorney-General* v. *Bishop of Worcester* (1); *In re Latymer's Charity* (2); and we ask for the discharge of the orders of the Commissioners, and for a reference to Chambers to settle a fresh scheme: *Ex parte Nicholls, In re Hackney Charities* (3).

[They also referred to the *Charitable Trusts Act*, 1853 (16 & 17 Vict. c. 137); *Charitable Trusts Act*, 1855 (18 & 19 Vict. c. 126); *Charitable Trusts Act*, 1860 (23 & 24 Vict. c. 136); *Endowed Schools Act*, 1869 (32 & 33 Vict. c. 56); *Endowed Schools Act*, 1874 (37 & 38 Vict. c. 87); *Seton* on Decrees (4); *Ex parte Incumbent of Brompton* (5); *Attorney-General* v. *Love* (6).]

Davey, Q C., and *Vaughan Hawkins*, for the Charity Commissioners:—

This petition is, in fact, an appeal from the scheme of the Charity Commissioners; and as the scheme has been approved by them after long consideration, the Court will not interfere with their discretion unless there has been a gross and palpable miscarriage: *In re Burnham National Schools* (7). The principle which prevails is that there shall be an enlarged administration of charitable trusts, and as was said by Lord *Westbury* in *Clephane* v. *Lord Provost of Edinburgh* (8), you look at the charity which is intended to be created and distinguish between it and the means directed for its accomplishment, which necessarily vary from age to age; and it is settled "that the means for the attainment of the end may be altered from time to time."

(1) 9 Hare, 328.
(2) Law Rep. 7 Eq. 353.
(3) 34 L. J. (Ch.) 169.
(4) 4th Ed. p. 553.
(5) 5 De G. & Sm. 626.
(6) 23 Beav. 499.
(7) Law Rep. 17 Eq. 241.
(8) Ibid. 1 H. L., Sc. 417, 421.

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As to *Lord Campden's Gift*, the intention is expressed in general terms "for the good and benefit of the poor;" and the founder appears to contemplate that alterations may take place in the manner of carrying out his purpose, for he adds in such manner as the trustees "from time to time should think fit to establish."

As to *Lady Campdens Gift*, one half is to be applied towards "the better relief of the poor." Now, doles which tend to pauperise the recipient are not so much for the benefit of the poor or for "their better relief" as a provision for their education. In *Wilkinson* v. *Malin* (1) it was held by *Lyndhurst*, C.B., that the income of a charity given in trust for the relief of the poor might be applied by the trustees, in their discretion, in educating the poor. And in the *Bishop of Hereford* v. *Adams* (2) and *In re Ashton Charity* (3), where education was not one of the objects expressly pointed out by the will, an application of the fund for that purpose was approved of by the Court; while in *Attorney-General* v. *Bovill* (4), where the original object of the charity was to give alms or doles to the poor, the Court, in making an order of reference to approve of a scheme, expressly authorized the Master to include provision for education. Moreover, there is an express direction that the other moiety of the income of *Lady Campden's Gift* is to be applied in apprenticing poor boys; and apprenticeship is merely technical education, and the educational part of the scheme is an improved substitute for apprenticing. The scheme is, therefore, only an expansion of *Lady Campden's Gift*.

Again, it is no part of the object of the scheme to alter what was done in 1852, and there is nothing in it inconsistent with the apportionment effected by that order.

[HALL, V.C.:—I will not trouble you upon that point. That objection might be met by introducing into the scheme a direction that the trustees should have regard to the apportionment in administering the charity.]

[They also referred to *Attorney-General* v. *Marchant* (5); *Attorney-General* v. *Mayor of Bristol* (6).]

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(1) 2 C. & J. 636; 2 Tyrw. 544.
(2) 7 Ves. 324.
(3) 27 Beav. 115.
(4) 1 Ph. 762.
(5) Law Rep. 3 Eq. 424.
(6) 2 Jac. & W. 294, 315.

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Hastings, in reply.

July 19. HALL, V.C.:—

In order to determine the questions arising in the present case, it will be convenient that I should first consider what is the construction of the charitable trusts to which the charity property is subject. The property known as *Cromwell's Gift* must, I think, be treated as divisible into two equal shares, one share being treated as an addition to *Lord Campden's Charity*, and the other share being treated as an addition to *Lady Campden's Charity*. Nothing that has taken place has, in my opinion, varied the original charitable trusts. The property subject to the trusts of each will remains subject thereto, there being two distinct charities although they have been administered by one set of trustees.

The trusts of *Lord Campden's Charity* are trusts declared of £200 "for the good and benefit of the poor of the town of *Kensington* for ever in such manner as Lord *Noel* and Sir *William Blake* and the churchwardens of the parish of *Kensington* from time to time shall think fit to establish for ever;" and the trusts of *Lady Campden's Charity* are trusts declared of £200 given to trustees upon trust that they "shall within eighteen months purchase lands of the clear yearly value of £10, one half whereof shall be applied from time to time for ever for and towards the better relief of the most poor and needy people that be of good life and conversation that shall be inhabiting within the said parish of *Kensington*, and the other half thereof shall be applied yearly for ever to put forth one poor boy or more, being of the said parish, to be apprenticed. The said five pounds due to the poor to be paid to them half yearly for ever at Lady-day and Michaelmas in the church or the porch thereof at *Kensington*."

As to *Lord Campden's Charity*, the trust is altogether undefined as to the mode of applying the income "for the good and benefit" of the poor, and the will contemplates the trustees from time to time determining how they will apply it to give effect to the declared object and purpose of the founder. As to *Lady Campden's Charity*, she directed half the property to be for "the better relief of the most poor," &c., and the other half to be applied for ever to put forth one poor boy or more of the parish to be

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apprenticed, the first half, *i.e.*, the £5 due to the poor, to be paid to them half-yearly for ever in the church or the porch thereof. As to this charity the testatrix's will expresses that the poor to be benefited were to be so benefited by their personally receiving the half, and the testatrix directs the other half to be applied to apprenticeships. As regards *Lady Campden's Charity*, the increased income of the property subject to the trusts of her will should be applied in equal shares in giving effect to the two charitable purposes: *Attorney-General* v. *Dean and Canons of Windsor* (1), referred to by Vice-Chancellor *Kindersley* in *Attorney-General* v. *Marchant* (2). Having regard to this, I hold that the scheme which the Commissioners have settled departs substantially from the proper application of the income. As to the founder's direction in favour of apprenticing boys, all that the scheme does is to include among many ways of applying half the income of the two charity properties, and any surplus of the other half after making certain payments thereout, "the payment of premiums by way of apprenticeship or suitable outfits or other mode of help or advancement to assist them on entering on the duties of life." That provision is altogether insufficient to give effect to the testatrix's declared intention, which was that half of her charitable disposition should be devoted to apprenticing boys. That provision does not even secure any sum being so applied. The clause I have read mentions several ways of applying the income, and it is only one of several clauses containing other ways of applying the income, so that the scheme does not secure the application of any income at all for apprenticeships. It was said in argument that the educational part of the scheme created a sufficient equivalent or an improved substitute for the apprenticing, which was, it was said, only industrial or technical education, and that experience had condemned apprenticing. I cannot sanction such argument as being entitled to legal weight. The testatrix had a right to select and endow apprenticing, it being a legal charitable purpose, and the Court must give effect to her direction, it not being shewn to have become actually injurious: see *Attorney-General* v. *Corporation of Rochester* (3); *Attorney-*

(1) 8 H. L. C. 369, 452. 6 Jur NS 833, (2) Law Rep. 3 Eq. 424.
(3) 5 D. M. & G. 797.

General v. *Governors of the Sherborne Grammar School* (1); *Philpott* v. *St. George's Hospital* (2). Some observations of Lord *Westbury* in *Clephane* v. *Lord Provost of Edinburgh* (3) were referred to as shewing that what the Court looks to is accomplishing the end, the means specified by the founder being only subordinate and not imperative, but those observations must be read with reference, and as only applicable, to the case in which they occur; to apply them to the present case would be to subvert what is the law as laid down in the cases to which I have referred.

I may observe that apprenticeship was one of the purposes which the Court selected as proper, although not specified in the case of *Attorney-General* v. *Bovill* (4). *Lady Campden's Charity* must be treated as half applicable for apprenticeship. As to the other half, I think, it being a charity for the poor in the form of their being personally recipients of the income, the Court should not without reasons, not shewn to exist, depart from its being so applied. I think that the decision of the Lords Justices in the case of *In re Lambeth Charities* (5) governs this case.

As to that case I have obtained a copy of the order of the Lords Justices, which shews that the Court of Appeal kept half the fund applicable, or primarily applicable, to the specified purpose.

The scheme will have to be reframed in reference to what I have said as to *Lady Campden's Charity*, and this no doubt will involve the reconsideration of the scheme as regards *Lord Campden's Charity*. As to that charity I think that education is within its scope. For this I think *Wilkinson* v. *Malin* (6) is a sufficient authority. *Attorney-General* v. *Bovill* is another authority to the same effect. In reframing the scheme, education may, and I think should, as regards *Lord Campden's Charity*, be had regard to, not so as that the whole income ought to be so applied, but that part thereof may properly be so applied. I do not consider I can now specify what such part should be.

It was said this petition was an appeal, and that a scheme which the Commissioners had approved should not be interfered with except for reasons not existing in this case. As to this *In re Burnham National Schools* (1) was referred to as establishing that the Court will not interfere with the exercise of the discretion of the Commissioners. I certainly should not interfere with what could properly be viewed as an exercise by the Commissioners of a discretion. Any scheme of theirs must be examined with due regard to their great experience and their qualifications for administering charitable trusts; but the Court cannot sanction a scheme framed by the Commissioners which it considers does not conform to the sound construction of the founder's declared trusts, particularly when, as in the present case, the usage has been conformable to what the Court holds to be the correct construction of the trusts.

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(1) 18 Beav. 256. 18 Jur 636
(2) 27 Beav. 107. 5 Jur NS 604
(3) Law Rep. 1 H. L., Sc. 421.
(4) 1 Ph. 762.
(5) 22 L. J. (Ch.) 959.
(6) 2 C. & J. 636.

The material alteration which the scheme will have to undergo renders it impossible for me to deal in detail with practical advantage with the objections made to many of the clauses of the scheme. I do not know which of such clauses will form part of the remodelled scheme. I may, however, mention that I think it desirable that all the trustees should be residents in the parish. I may further say that many of the objections made to the scheme of the Commissioners, excluding those involving principles, and with which I have above dealt, are in my judgment unimportant. The views of the Commissioners as to details should not be called in question.

It was urged before me on behalf of the Petitioners that the scheme as framed was not correctly framed, having regard to the apportionment of the revenue into eighty-eight shares by the order of the 23rd of December, 1852, as between the six distinct parishes or chapelries. It appeared to me that this objection might be obviated by a clause introduced into the scheme. In reframing the scheme it will be proper to consider how the scheme should stand in reference to that apportionment. I think it should be framed so as to give complete effect to the apportionment, each of the six parishes or chapelries being treated as separately entitled to its apportioned share, without there being an attempt to alter in any material respect the apportionment.

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(1) Law Rep. 17 Eq. 241.

I think that the new scheme should deal with the two charities separately. This I consider important in reference to the distinctions existing between the trusts of the two charities and to variations which there may be in the relative amounts of the revenues of the charities.

I remit the order of the board to the board for their reconsideration, and I order that the scheme settled by the Commissioners be reframed by them, and that in reframing it regard be had to the following directions, which should be comprised as declarations in my order: first, the property belonging to the charity known as *Cromwell's Gift* shall be deemed to belong, and be treated as belonging, in equal undivided shares to the two other charities; secondly, the revenue of the property belonging to *Lord Campden's Charity* may be dealt with by applying part thereof for education or otherwise in connection therewith; thirdly, the revenue of *Lady Campden's Charity* shall be dealt with as applicable as regards one half thereof for the benefit of the poor by their being recipients thereof in the form of pensions or otherwise, and as regards the other half thereof, for the apprenticing boys, with proper provisions for the application of any surplus income of each moiety; fourthly, that regard be had to the distribution of income provided for by the order of the 23rd of December, 1852.

My order will provide for the payment of the Petitioners' and the Attorney-General's costs as between solicitor and client, and any costs, charges, and expenses of the Attorney-General, out of the income of the property of the two charities in equal shares. The order will also reserve liberty to apply. This will enable the Petitioners or Attorney-General to obtain the views of the Court as regards any question arising in remodelling the scheme without having to present a new petition.

C. A. From this decision the Charity Commissioners appealed. The appeal came on to be heard on the 24th of May, 1881.

Davey, Q.C., *Vaughan, Hawkins*, and *Cecil Russell*, for the Appellants.

Hastings, Q.C., and *Lewin*, for the Petitioners.

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JESSEL, M.R.:—

This is an appeal from the decision of Vice-Chancellor *Hall* refusing to confirm a scheme of the Charity Commissioners for the future management of three charitable gifts—one by Viscount *Campden*, one by Viscountess *Campden*, and one by an unknown donor, supposed to have been *Oliver Cromwell*, although that is not actually known: but it is called "*Cromwell's Gift.*" It appears to me that the facts that have now been brought out before the Court of Appeal were to a considerable extent not known to the Vice-Chancellor, and in differing from him, as I am compelled to do, as to the present decision, I must say that I think it is by no means impossible that he would have come to a different conclusion if he had known or had been made aware of all the additional facts that have been brought out in the course of the discussion.

In the first place, the scheme is made in pursuance of what is commonly known as the *cy-près* doctrine, and, in cases like this, it is applied where, from lapse of time and change of circumstances, it is no longer possible beneficially to apply the property left by the founder or donor in the exact way in which he has directed it to be applied, but it can only be applied beneficially to similar purposes by different means.

In the present case the property has increased enormously in value. The property which was left by the Viscountess *Campden* produced £10 per year. No doubt £10 per year in the time of Queen *Elizabeth* was a very different sum from £10 a year now, but still a moderate sum compared with the present value of the property, which is about £2200 a year. The property left by the Viscount *Campden* has increased in the same way from £10 a year to £1040 a year, and the property purchased from *Cromwell's Gift*, which appears to have been £45, now produces, I think, something like £1000 a year. Therefore the increase in value has been something enormous. In the next place, the persons who were to be benefited were poor parishioners of *Kensington*, subject to what I am about to say about the different instruments. The then village of *Kensington* was a small village about a mile and a half from *Hyde Park* corner, and in old documents it is called a village. As it grew it called itself a town, but it seems never to have been legally a town in the sense of having a market

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and franchises. Now it is what we know it, a suburb of *London*, very thickly inhabited with many thousands of people, and containing a large number of houses of great magnitude and value, inhabited by wealthy people. The whole of the circumstances of the place have changed. That which was a provision for the poor inhabitants of a village is now a provision for the numerous inhabitants of this large town or part of a town.

Again, circumstances have changed in another way. The habits of society have changed, and not only men's ideas have changed but men's practices have changed, and in consequence of the change of ideas there has been a change of legislation; laws have become obsolete or have been absolutely repealed, and habits have become obsolete and have fallen into disuse which were prevalent at the times when these wills were made. The change, indeed, has become so great in the case that we are considering, that it is eminently a case for the application of the *cy-près* doctrine, if there is nothing to prevent its application.

Now, as regards the will of Lord *Campden*, there is no question at all. It is a provision for the poor of *Kensington*, as the trustees for the time being shall in their discretion think it desirable to distribute the fund; therefore any change which was acquiesced in by them (and the present scheme was made at their request by the Charity Commissioners) is within the actual terms of Lord *Campden's* will. No difficulty arises, therefore, as to the disposal of the funds given by that will, nor has any argument been addressed to us as regards that portion of the property.

As regards *Cromwell's Gift*, there is no evidence at all as to what the founder's intention was. There is evidence that it has for a great number of years past been vested in the same trustees as the trustees of *Lord and Lady Campden's Charity*, and has been applied practically as part of those charities, or of one of them; but, in the absence of evidence, all that I think that proves is that it was a gift for the benefit of the poor of *Kensington*, but whether it was on the terms of Lord *Campden's* will or of Lady *Campden's* will, or on any other terms, is unknown, and, consequently, as regards that part of the gift there can be no objection to a proper appropriation of it for the benefit of the poor of *Kensington*.

The great stress of the argument was as regards the will of the Viscountess *Campden*, and as to that there are definite directions to be found which, it is alleged, will be contravened by sanction being given to the proposed scheme of the Charity Commissioners.

Now, as to that, it is necessary to see what they are. She gives money, £200, to be laid out in land to produce £10 a year on trust that the legatees, who are named, parishioners of *Kensington* and the churchwardens of the parish, shall apply the rent in this way: one moiety from time to time for ever for and towards the better relief of the most poor and needy people that be of good life and conversation that should be inhabiting within the said parish of *Kensington*, and the other moiety, or half part thereof, shall be applied yearly for ever to put forth one poor boy or more, being of the said parish, to be apprenticed, and the £5 which shall be due to the poor of the parish to be paid to them half-yearly for ever at Lady-day and Michaelmas in the church or the porch thereof at *Kensington;* and that is the whole.

Now it is said that as regards the apprenticing of the poor boys we are to apply £1100 a year in exactly the same way that the testatrix directed £5 a year to be paid. The answer, I think, is very plain. In giving £5 a year to apprentice one poor boy or more she evidently thought that there might occasionally be a chance of more than one boy, but her notion was that there would be enough for one boy, and, no doubt, that was so at that time, and having regard to the £5 a year which was all she gave. But did she imagine, or can anybody suppose she imagined, she was going to provide £1100 a year to apprentice any number of boys that might be living in the parish. Of course, she was not dealing with anything of the kind. The amount has so increased that we have no knowledge, nor can we even guess, what she would have done with it if she had anticipated any such increase. But then there is this further observation to be made, that at the time when this will was made apprenticeship was compulsory by the law of *England*. It was actually part of the then legislation by the Act of 5 Eliz. that nobody should exercise a trade in this country without he had been apprenticed. He need not have been bound by indenture, but he must have been apprenticed for seven years, and by some of the subsequent Acts that was extended beyond the trades mentioned in that Act to other trades and callings, and the legislation so remained until the 54th year of King *George* III., so that we can perfectly well understand why she directed the boys to be put out and apprenticed. It was the only way in which the poor boys of the parish could be enabled to exercise a trade, and it was not therefore that she desired an apprenticeship *per se*, but she wished to benefit the poor by enabling the poor boys of the parish to earn their living as mechanics or otherwise, having regard to the trades specified in the statute of Queen *Elizabeth*. That was her object. Times have changed; as I said before, ideas have changed. All that legislation has been repealed. It is no longer obligatory on poor boys to be apprenticed. They can be taught in other ways a knowledge of their trade in much shorter periods, and can thereby be enabled to earn their living. Besides this, the same ideas which produced a change in legislation have also produced a change in the habits of mankind in this country. Apprenticeship, although not quite obsolete, is rapidly becoming so. Fewer masters take apprentices and fewer boys are apprenticed. Here again we must have regard to the existing usages of society and the existing wants of the poor who are intended to be benefited. It appears to me this is exactly the case which was pointed out by Lord *Westbury* in *Clephane* v. *Lord Provost of Edinburgh* (1), cited by the Appellants' counsel, where the means to an end require change, the end being kept in view; the end to be kept in view being such an education to be given the young poor of the parish as will enable them to gain their livelihood in an honest and respectable manner. It therefore appears to me to be quite reasonable that while leaving to some extent the direction contained in Lady *Campden's* will, so as to ensure some apprentices being still bound, there being still, as it appears by the evidence, some masters willing to take apprentices, and some boys desirous of being apprenticed, we should not confine the discretion of the trustees by directing them to expend the whole of this large fund in binding boys apprentice, but leave them a discretion beyond the small number which we think it should be compulsory on them still to bind apprentice, to apply the rest of the fund either in apprenticing boys, which they still

(1) Law Rep. 1 H. L., Sc. 417.

may do if it is found desirable, or any other similar purposes for the benefit of the poor of the parish.

I think that disposes of the objection, which I must say on the part of the Respondents was not much insisted upon, as to the extent to which the funds should be applied in apprenticing children.

The next point is as regards the other half of *Lady Campden's Charity*, which is given in what is technically called doles. It is £5 per year to be distributed in two half-yearly payments to the poor alone and in the church or porch thereof. That means 50*s.* each half-year to be paid in money, in shillings and sixpences and half-crowns, to the poor people of the village who come to church. That is the practice in many parishes in *England*, and it is a practice which I think would be more honoured in the breach than in the observance. There is no doubt that it tends to demoralise the poor and benefit no one. With our present ideas on the subject, and our present experience, which has been gathered as the result of very careful inquiries by various committees and commissions on the state of the poor in *England*, we know that the extension of doles is simply the extension of mischief. That is a very great reason for not extending them if we can help it. Here, again, no one has contended that £1100 per annum shall be distributed in two half-yearly portions in coin to the poor at the church or church porch. We have not to overrule any objection on this ground, for no objection has been made. No one suggests that such a mischievous practice should be continued. It has been in fact abandoned for a great number of years. The trustees have not at all followed this direction of the will. But ought we, sitting here simply to interpret the law, to hold ourselves bound by the words of the will to distribute this large sum of money in doles in this fashion? I think we ought not. As I said before, we must consider not only the change in amount, but the change in circumstances. That which might be tolerable, that is, the distribution of 50*s.* in each half-year among a few poor people in a small village, as I said before, would be intolerable on a large scale in a large town like *Kensington*. But was it the intention of the testatrix? Here again I should say emphatically, No. Could she have intended to distribute 500 sovereigns every half-year

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among the poor of a large town like *Kensington.* There was no such idea in her mind. She was, as I said before, giving this comparatively small sum of 50*s.* to a few poor people in the village. Probably she thought the distribution would be carefully superintended by the churchwardens, who would know the deserving poor, which is the class of poor she intended to benefit, and would not do any mischief and might be productive of some good. It seems to me, when you consider the change in the amount of money and the change in the surrounding circumstances, you cannot impute to the testatrix an intention to distribute this large sum in the way I have mentioned, and I must add in favour of the Petitioners that it was not suggested on their part that any such course should be adopted.

That being so, and we being bound to administer the funds *cy-près,* what is the principal object which the testatrix had in view as distinguished from the means by which she wished that object to be carried out? The principal object was to provide for the poor, and what poor? For the relief of "the most poor and needy that be of good life and conversation that should be inhabiting the parish of *Kensington.*"

Now the trustees have altogether departed from the will, and I think without sufficient authority. It is not necessary perhaps to go minutely into that question. Some reliance was placed on an order of Vice-Chancellor *Stuart* in 1852, but when the matter came to be examined into it was found that the order referred back to the Master's report, and the Master's report reported that the trustees distributed the money regularly, three-fourths among the poor and one-fourth for the apprenticing of the boys. Therefore the order of Vice-Chancellor *Stuart* merely confirmed that and did not empower the trustees to do what they have been doing. Now, what they have been doing is this. I am not saying they have been doing anything wrong. On the contrary, what they have done has been a more beneficial application of the funds than if they had obeyed the directions of the will. What they have been doing is to make a new scheme of their own motion, which, though it might have been lawful as regards the trusts of the will of Lord *Campden,* where they had a discretion, and possibly may have been lawful as regards *Crom-*

well's Gift, as to which we know nothing, could not have been lawful as regards Lady *Campden's* will without the sanction of the proper authority, either the Charity Commissioners or the Court of Chancery. They have made a new scheme for themselves, and their scheme has been that, instead of giving these doles twice a year, they have elected pensioners, persons who take small annuities as long as they shall conduct themselves properly and are inhabitants of the parish. They have limited the class of recipients in various ways not consistent with the terms of the will. Instead of giving the pensions—which are not authorized by the will, because doles are only casual payments as distinguished from permanent payments—to the most poor and needy people, which are the words of the will, they have given them to what I may call the next class of people, the people who, according to the evidence, have some means not sufficient to support them comfortably, but some means. They are certainly not the most poor and needy people. Then they have restricted the gifts to people as a rule who have been resident for fifteen years in the parish. That is a very wholesome restriction (I do not refer to the number of years; that has been reduced by the Commissioners to seven), and wholesome in this way: if you did not adopt that restriction people would come and live in the parish a week with a view of getting a share of this charity, and of course it was felt that it was desirable to prevent a pauper population flocking into *Kensington,* merely attracted there by the existence of these charities, a thing which has happened in some parishes in *England,* and to avoid that mischief they made the rule as to fifteen years' residence. I am not finding any fault with them, except that they did it without authority. Then they restricted it to people above the age of sixty. There is no such restriction in the will, although under the rule persons who have been long in the parish and are of considerable age might be entitled to a preference, they had no right to impose any such restriction. On the whole, they have administered the charity for a great number of years past, I will not say in utter oblivion of the directions of the will, but with a complete disregard of those directions, and although what they have done has been very beneficial, it was not legal. The consequence is that it is impossible for the present Petitioners to say that what the trustees have done is not to be reversed. There is no legal scheme authorizing what they have done as regards *Lady Campden's Charity*, and no legal authority, and therefore a scheme must be established; and, having arrived at that conclusion, I have only now to advert shortly to the objections to this scheme as regards the disposition of the fund which was given to the poor by way of doles.

It has been suggested that, inasmuch as a dole is a payment direct to a poor person, in carrying out the new scheme the Court is bound by that portion of the direction of the old scheme or will which directs the dole to be paid in personal payments. The answer is very simple; if you do not direct it to be laid out in doles at all the mere incident of a dole that it is paid to some person direct cannot be regarded as a direction given by the testatrix. The testatrix directs the dole to be paid, and nothing else, and the personal payment follows; but if you get rid of the dole altogether, on the ground that it is not longer desirable to keep it in continuance, how can you say you are bound to respect that which is not a direction of the will but a mere incident to the direction, the personal payment to the poor people? It appears to me that that objection is wholly unfounded.

Then there were some minor objections which have been to a certain extent conceded, which I will not advert to. They were matters of detail, which, as a general rule, are dealt with in Chambers.

Then I will come to the general principle of the scheme. Now it is a scheme of great magnitude, and involving a great number of details. I have looked at them. I have had no inconsiderable experience as to the settlement of schemes. I find the scheme is in accordance with what is now the modern practice as to settling schemes, and, speaking for myself, I see no objection to the details. But if I did I should not think it part of our duty to interfere. This is a scheme settled by a competent authority, the Charity Commissioners, persons not only of great but of special experience in these matters, and persons intrusted with the supervision of these matters as a separate body by the Legislature for that very reason. It would not be, in my opinion, sufficient for a Judge to say he thought some detail might well be different, or that if he himself had originally settled the scheme he should have put in some other arrangements than those which are specified in the scheme. He must be satisfied that the Charity Commissioners have gone wrong either by disobeying those rules of law which govern them, as well as they govern Courts of Justice, or else that there has been some slip or gross miscarriage which calls for the intervention of the Court to set aside and remodel the scheme. As I said before, with regard to these matters of detail one or two have been pointed out as to which alterations have been made or have been agreed to be made, and subject to those alterations I think the scheme ought to be confirmed.

The result will be that the Vice-Chancellor's order will be discharged except as to costs, that the scheme will be confirmed subject to the alterations specified, and as it is a case in which the inhabitants were heard by permission of the Attorney-General, in which the funds are very large, in which their intervention has secured some alterations of the scheme, and having regard to all the circumstances of the case, I think it would be proper that the costs of the Respondents, as well as of the Appellants, should be provided for in the usual way out of the income of the charity funds.

JAMES, L.J.:—

I am of the same opinion. The main question and the real question that has been raised on this appeal is whether the Commissioners have in fact exceeded their jurisdiction in what they have done. I think when we are dealing with a scheme settled by persons like the Commissioners, that we should consider this, that the Court of Chancery, to which an appeal is given by the statute, is really sitting more as a Court of Prohibition than as a Court of Appeal on review, that is to say, that it ought to be satisfied that the Commissioners have done something which they ought not to have done, having regard to the instruments creating the trust.

Now, the main question argued before us was that in fact they have done that, that is, that they have disregarded the special directions of the instruments creating the trusts.

With regard to all but *Lady Campden's Charity*, it appears to me that there is no foundation whatever for that suggestion.

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The gift of Lord *Campden* is for the poor generally, and that is to be applied in the manner which the proper authorities should think best for the poor, having regard to all the circumstances of the case and the circumstances and feelings and habits of the times. There seems to me to be no ground, as I have said, for supposing that, having regard to *Lord Campden's Charity*, there is any question at all as to the jurisdiction of the Commissioners. With regard to the charity that resulted from *Cromwell's* gift, that appears to me to be exactly the same. All we know about that is that it was a gift for the benefit of the poor of the parish of *Kensington*. With regard to *Lady Campden's Charity*, no doubt there is an apparent difficulty which has to be dealt with, because Lady *Campden* by her will, beyond all question, has given a specific direction, that is to say, she has directed one moiety of the income of her estate to be distributed in eleemosynary gifts of a particular kind, and with regard to the other half, she has directed that it shall be applied in putting out poor boys to be apprenticed.

Now, with regard to the first half, of course if the direction is to be strictly followed it must be as the Master of the Rolls has pointed out, by a distribution among the most poor and needy of the parish in small doles. As has been observed, it ought to be divided into as many shillings as there would be most poor and to whom a shilling would be an object of moment, and they ought, instead of increasing the amount to a few, to increase the number and distribute it in that way, that is, if the will is to be strictly followed. But in truth that has not been done, and nobody has ever thought it possible to do it. At the time when this charity was founded no doubt it might have been done reasonably enough. The churchwardens were to distribute it in the church or at the church porch among the people, and it was supposed at that time that they knew every inhabitant of the parish, and would know exactly who the poor people were to whom they ought to give these periodical gifts; but that of course has become utterly impracticable, and the trustees have now for centuries, at least for a very long period of time, themselves established a *cy-près* application of that moiety; and if they had a right to establish a *cy-près* application by reason of the change of circumstances, it is certainly a very strong thing to say that the Court of Chancery had not the same power, and a strong thing to say that the Commissioners, who in this respect have succeeded to the powers of the Court of Chancery, had not at all events as much power to make a *cy-près* application as the trustees themselves, who thought it necessary and beneficial to do it. The real mode in which the objection was addressed to us was this, "Ours is a more *cy-près* application than yours." That does not appear to me to be a valid objection; there is no such thing as more or less *cy-près* on the question of jurisdiction in dealing with what ought to be done with the fund under the change of circumstances. The trustees have been dealing with it according to their *cy-près* scheme, and it appears to me that the suggestion that their scheme is more *cy-près* than that which the Commissioners propose to make, at all events does not go to the jurisdiction of the Commissioners to determine what, according to their judgment, is the best mode of dealing with the fund. It appears to me, therefore, that the objection fails.

Then with regard to the apprenticeships, I quite agree with what the Master of the Rolls has said, that we are dealing with a fund different in amount and different in substance. We are dealing with a fund so large that that itself would afford a very good and reasonable ground for applying it *cy-près.* But what strikes me as the strong thing is this, that to confine the application of that charity in the present state of things, in the present state of feeling and the present state of the law, to those persons only among the poor of *Kensington* whose children would be willing to become apprentices to tradesmen or otherwise, and to exclude from the charity all that other mass of poor people who have got the same claim and who do not now find it beneficial for their children to be put out as apprentices, would be, in fact, to exclude from the charity the great majority of that class of poor who it is obvious to my mind Lady *Campden* contemplated as recipients of the benefit of the charity, and that in doing that we should be in truth defeating the spirit of Lady *Campden's* gift by following strictly the letter when that letter has become inapplicable. I therefore entirely agree with the view which the Master of the Rolls has expressed, and say that I would not myself as a Judge interfere, there being jurisdiction to begin with in the

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Commissioners, with the mode in which they have exercised that jurisdiction, unless I was satisfied that they were doing something wrong in principle or wrong in law, that they were doing something in which they ought to be restrained as exceeding their jurisdiction, and not on any view of my own as to whether they or I take the right view as to the most beneficial mode of dealing with the fund. I think they know more about it than I do, and I should defer to them instead of asking them to defer to me.

LUSH, L.J.:—

I do not think it necessary to add anything to the elaborate judgments delivered by my learned colleagues, or to say anything more than that I concur in all that they have said, and especially as to the principles on which this Court should act when reviewing the decision of the Charity Commissioners.

Solicitors for Petitioners: *Marriott & Jordan.*
Solicitor for Commissioners: *J. M. Clabon.*

W. W. K.
M. W.

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June 22, 23.

HARRISON *v.* CORNWALL MINERALS RAILWAY COMPANY.

[1880 H. 24.]

Railway Company—Borrowing Powers—Debenture Stock—Mortgages—Companies Clauses Act, 1863 (26 & 27 *Vict. c.* 118), *Part* III.*—Priority—Debenture Stock "at any time created by the Company"—Practice—Rules of Court,* 1875, *Order* LVIII., *r.* 6*—Costs—Cross Notice of Appeal.*

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By the *Cornwall Minerals Railway Act*, 1873, the *Cornwall Minerals Railway Company* was empowered to borrow on mortgage to the extent of £250,000, and to issue debenture stock subject to the provisions of the *Companies Clauses Act*, 1863, Part III., but notwithstanding anything therein contained, the interest of all debenture stock "at any time created by the company" was to rank *pari passu* with the interest of all mortgages "at any time granted by the company," and should have priority over all principal moneys secured by such mortgages.

By a later Act of 1875, the company were empowered to raise additional capital; and after providing that the principal secured by all mortgages granted by the company before the passing of the Act, should have priority over the principal secured by all mortgages granted by virtue of that Act, the company was empowered to issue debenture stock, subject to the provisions of the *Companies Clauses Act*, 1863, but the interest of all debenture stock created and issued at any time after the passing of that Act was to rank *pari passu* with the interest of all mortgages granted after the passing of that Act, and should have priority over all principal moneys secured by such mortgages.

By another Act of 1877 power to raise a further sum by the issue of debenture stock under provisions similar to those in the Act of 1875 was given to the company.

The company granted mortgages and issued debenture stock under the powers of the Act of 1873 before the passing of the Act of 1875.

They also issued further debenture stock under the powers of the Act of 1873 after the passing of the Act of 1875, but before the passing of the Act of 1877. They also issued further debenture stock under the powers of the Act of 1873 after the passing of the Act of 1877; and also issued debenture stock under the powers of the Acts of 1875 and 1877 after the passing of the Act of 1877.

The company being unable to pay the interest on all these mortgages and debenture stocks in full, a receiver of the undertaking was appointed by the Court, and a special case settled for ascertaining the priorities:—

Held, first, that notwithstanding the words "at any time," in the Act of 1873 the enactment therein contained applied only to the mortgage debt and debenture stock for which provision was made by that Act.

Secondly, that upon the true construction of the several Acts of 1873, 1875, and 1877, the order of priority of the interest on the mortgages and debenture stocks was as follows:

(1.) The interest on the mortgages and debenture stocks granted and issued under the powers of the Act of 1873 previously to the passing of the Act of 1875.

(2.) The interest on the debenture stock issued under the Act of 1873 after the passing of the Act of 1875, but before the Act of 1877.

(3.) The interest on the debenture stock created under any of the Acts, after the passing of the Act of 1877.

Thirdly, that the principal of mortgages for the time being due had priority of payment next after the interest of the debenture stock issued before the passing of the Act of 1875.

The decision of *Hall*, V.-C., substantially affirmed.

A Respondent who has given cross notice of appeal under Order LVIII. r. 6, is in the same position as to costs as if he had presented a cross appeal.

Where there were two Respondents to an appeal, one of whom gave cross notice of appeal affecting his co-Respondent, the Court made an apportionment of the costs of the appeal.

Affirmed by H. of L. 8 App. Cas. 780

THIS was an appeal from a decision of Vice-Chancellor *Hall* (1). The facts were stated in a special case, and are given in full in the previous report. They may be shortly stated as follows:—

The *Cornwall Minerals Railway Company* was incorporated by the *Cornwall Minerals Railway Act,* 1873, and its affairs were managed under that Act and two subsequent Acts of 1875 and 1877. By the first-mentioned Act the *Companies Clauses Act,* 1845, and Part III. of the *Companies Clauses Act,* 1863 (relating to debenture stock) were amongst other Acts, and except where expressly varied, incorporated therewith, and the company was empowered from time to borrow on mortgage any sum not exceeding £250,000.

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(1) 16 Ch. D. 66.

(1) Followed in Johnstone v. Cox 19 Ch. D. 17. 21. C.A. but see Robinson v. Drake 24 Ch. D. 98.

By the 11th section of the same Act the company was empowered to issue debenture stock subject to the powers of Part III. of the *Companies Clauses Act,* 1863, but notwithstanding anything therein contained the interest of all debenture stock at any time created and issued by the company should rank *pari passu* with the interest of all mortgages at any time granted by the company, and should have priority over all principal moneys secured by such mortgagees.

The *Companies Clauses Act,* 1863 (26 & 27 Vict. c. 118) provides in Part III., s. 24, "that the interest on debenture stock shall . . . . rank next to the interest payable on the mortgages or bonds for the time being of the company legally granted before the creation of such stock; but the holders of debenture stock shall not as among themselves be entitled to any preference or priority."

The 30th section of the same Act is as follows:—

"Nothing herein or in the special Act authorizing the issue of debenture stock contained, shall in any way affect any mortgage or bond at any time legally granted by the company before the creation of such stock, or any power of the company to raise money on mortgage or bond, but the holders of all such mortgages and bonds shall during the continuance thereof respectively be entitled to the same priorities, rights, and privileges in all respects as they would have been entitled to if the special Act authorizing the issue of debenture stock had not been passed."

Under the powers of the Act of 1873 the company before the 28th of August, 1874, raised £226,400 by mortgages for short fixed periods.

In pursuance of a resolution passed on the 28th of August, 1874, the company before the 19th of July, 1875, issued £23,600 debenture stock at £5 per cent. (being the balance of the £250,000 which they were empowered by their Act to raise) and £21,725 further debenture stock to pay off or to exchange for the like sum borrowed on mortgage, making together £45,325 debenture stock, and leaving £204,675 due on mortgages issued under the Act.

On the 19th of August, 1875, the *Cornwall Minerals Railway Act*, 1875, was passed, by which the company was empowered to raise additional capital not exceeding £75,000, and in respect thereof to borrow on mortgage any sum not exceeding £25,000.

By sect. 14 of that Act it was enacted that the principal moneys secured by all mortgages granted in pursuance of any Act of Parliament before the passing of that Act and subsisting at the passing thereof, should during the continuance of such mortgages have priority over the principal moneys secured by any mortgages granted by virtue of that Act.

By sect. 15 it was enacted that the company might issue debenture stock subject to the provisions of Part III. of the *Companies Clauses Act*, 1863, but notwithstanding anything therein contained the interest of all debenture stock at any time after the passing of that Act created and issued by the company should rank *pari passu* with the interest of all mortgages at any time after the passing of that Act granted by the company, and should have priority over all principal money secured by such mortgages.

No portion of the £25,000 authorized to be raised by the Act of 1875 was raised by the company previously to the 10th of August, 1877, but after the passing of the Act of 1875 the further sum of £163,675 debenture stock was issued under the powers of the Act of 1873 in exchange for or to pay off subsisting mortgages. So that on the 10th of August, 1877, the sum of £45,325 and £163,675 debenture stock and £41,000 then outstanding on mortgages constituted the securities issued by the company under the Act of 1873.

On the 10th of August, 1877, the *Cornwall Minerals Act*, 1877, was passed. By that Act the company was empowered to raise a further sum of £100,000 by the creation and issue of debenture stock bearing interest at £4 per cent. for the payment of certain purchase-moneys under provisions similar in terms to those contained in the 15th section of the Act of 1875.

Under resolutions passed on the 4th and 23rd of August, 1877, the company issued under the Act of 1873 £9270 £4 per cent. debenture stock, whereby the existing mortgages of the company were reduced to £31,730 which, with the said sum of £45,325 and £163,675 £5 per cent. and £9270 £4 per cent. debenture stock made up the £250,000 which the company was authorized to borrow under their Act of 1873, and these mortgages and sums of stock were still existing.

Subsequently to the passing of the last-mentioned resolutions the company issued the further sum of £125,000 £4 per cent. debenture stock, being the sum authorized under the powers of the Acts of 1875 and 1877. This issue was made in one sum without any distinction between the sums of stock respectively authorized by the two Acts. The whole of this issue of £125,000 debenture stock was still in existence.

The Plaintiffs were the holders of £5 per cent. debenture stock issued under the Act of 1873 to the amount of £85,275, of which £15,815 was issued prior and the residue subsequently to the passing of the Act of 1875.

The Defendant *W. Fenton*, was the holder of £10,000 £4 per cent. debenture stock, part of the £125,000 created and issued under the Acts of 1875 and 1877; the Defendant *Thomas Brassey* was the holder of overdue mortgages to the amount of £5000 granted by the company under the Act of 1873.

The company having fallen into difficulties, a receiver was appointed by Vice-Chancellor *Malins* in March, 1880, and questions arose as to the order in which the interest on the several classes of debenture stock and mortgages and the principal of the mortgages ought to be borne.

This action was accordingly brought for the purpose of obtaining the opinion of the Court on these points; and a special case was stated under Order XXXIV., rule 1, in which the following questions were submitted to the Court:—

1. Whether the interest on the mortgages granted on the debenture stock created and issued by the Defendant company under the powers of the *Cornwall Minerals Railway Act*, 1873, has priority over the interest on the whole or any and what part of the debenture stock created and issued by the Defendant company

under the powers of the *Cornwall Minerals Railway Act*, 1875, and the *Cornwall Minerals Railway Act*, 1877, or of either of the last-mentioned acts.

2. Whether the interest on the mortgages granted, or the debenture stock created and issued by the Defendant company previous to the 19th of July, 1875, and now continuing in existence, has priority over the interest on the whole of the debenture stock created and issued by the Defendant company after that date, or how the several mortgages granted and the debenture stock created and issued by the Defendant company rank for interest *inter se*.

3. Whether the principal as well of such of the mortgages as are now due, as also of such of the mortgages as will hereafter become due, are repayable next after the interest of such mortgages and of any debenture stock ranking as regards interest *pari passu* with such mortgages in priority to the interest of other subsequent debenture stock, or in what order the principal of the said mortgages ranks with the interest of the mortgages and debenture stock.

4. Whether the holders of the mortgages of the Defendant company which have not become due, are entitled to a lien in respect of the principal to become due upon their said mortgages on the funds now in the hands of the receiver and hereafter to come into his hands.

5. How and by whom the costs of this action and special case ought to be borne and paid.

The Vice-Chancellor held that the answers to the first and second questions must be that the interest on the subsisting mortgages and debenture stock created and issued by the company under the provisions of the Act of 1873, had priority over the interest on the whole of the £125,000 debenture stock created and issued by the company under the provisions of the Acts of 1875 and 1877; and that the interest so having priority was payable *pari passu* to the mortgagees and holders of debenture stock having such priority.

In answer to the third question, he held that the principal of the mortgages for the time being due had by reason of the appointment of a receiver under the Act of 1873 priority of payment next after the interest having priority, as mentioned in the answer to the 1st and second questions.

The fourth question he answered in the negative.

The costs were ordered to be paid out of the moneys in the hands of the receiver.

From this decision the Defendant, *W. Fenton*, appealed.

The question as to priority of interest was first argued.

Davey, Q.C., *Webster*, Q.C., and *Medd*, for the Appellant.

W. Pearson, Q.C., and *Norton*, for the Defendant *Brassey*.

Benjamin, Q.C., *Kekewick*, Q.C., and *Stirling*, for the Plaintiffs.

Hastings, Q.C., and *Prior*, for the company.

The arguments adduced were the same as those relied on in the Court below.

JESSEL, M.R.:—

This case has been very fully argued; but I must say I do not think it is a case of very great difficulty, nor do I think the reasons given by the learned Vice-Chancellor in the Court below are altogether satisfactory. It very often happens that that circumstance occasions an appeal, although the decision may be really correct. The view I take of the case is a very simple one. Under the original Act of 1873, there was a clause which put mortgages and debenture stock as regards interest—and the whole of my judgment applies only to interest, because we have not yet heard the cross appeal—which put the interest of the debenture stock and the interest of the mortgages on the same footing of equality. Then there was an Act of Parliament passed, the Act of 1875, which authorized in very few and simple words a further issue of debenture stock or mortgages; it authorized additional capital by way of loan and provided that "the interest of all debenture stock at any time after the passing of this Act created and issued by the company shall rank *pari passu* with the interest of all mortgages at any time after the passing of this Act granted by the company." What does that mean? Shall it be confined by those words to debenture stock issued under the powers creating debenture stock under this Act? There is nothing in the Act to say so, and there is a very intelligible reason why the Legislature should not say so. No doubt the larger the fund of debenture stock you can issue, having the same rights, the better chance you have of issuing it, and this is a debenture stock remaining to be issued. On the other hand, the argument appears to me to be without answer, that the vested rights of persons acquired before the passing of the Act, who either bought debenture stock or lent money on mortgage, are not interfered with by the legislature without compensation, and it requires the strongest and clearest words in an Act of Parliament before you are entitled so to interpret it, as to deprive people of their property without compensation. It appears to me therefore clear, if I may say so, that there is nothing in this Act to affect the rights of the mortgagees and debenture stock holders who were so before the passing of the Act. But as regards the future, there is a good deal to interfere with them, and there is a very good reason why they should be interfered with. They have no rights at all. They acquire their rights after the passing of the Act, and of course with notice of it. No companies borrow under their statutory powers, or ought to borrow without expressing all the Acts under which they borrow, and I believe they do. It is the practice to state under what Acts they borrow the money, so that the lenders may look at the Acts for themselves, and see what the powers are. Any lender would, no doubt, be very foolish who did not inquire of the company as to what their borrowing powers were, and I have known such questions addressed to secretaries of companies over and over again. That being so, of course, when they come to raise the money, it would be easier to raise it if they could raise the whole amount with the right of the holders to interest *pari passu.* It appears to me that the moment you see they are to rank *pari passu* with the interest of all mortgages granted after the passing of the Act, it shews that they are not to rank *pari passu* with the interest of all mortgages granted before. For the reason I have given it would be an unjust and a wrong reading. If you distinguish between mortgages granted before and afterwards for what purpose is it? To postpone the second set, and therefore the meaning of the section is that they shall rank on an equality with mortgages granted after the passing of the Act, and then that the mortgages granted after the passing of the Act, though under the first Act they would have had interest *pari passu*, shall now be postponed. That accounts for the 14th section, which applies to the principal only, and not to the interest on the mortgages. That being so, the result is this, that all the debenture stockholders who held stock at the time of the passing of the Act of 1875, and all the mortgagees who held mortgages at the time of the passing of the Act of 1875, have priority as to interest over all those who obtained stock or mortgages issued afterwards.

Now we come to another Act, the Act of 1877. That Act has a clause, I was going to say, exactly like the former, but there is one difference in it. Before there was no power of granting mortgages under the Act, and still it says that "the interest of all debenture stock at any time after the passing of this Act created and issued by the company shall rank *pari passu* with the interest of all mortgages at any time after the passing of this Act granted by the company." That could only refer to mortgages granted under the powers of prior Acts, and therefore it is plain there that the mortgages granted after the passing of the Act under the powers of the prior Acts would be postponed to those granted before. As I said before, it would be impossible to read it otherwise, because to read it otherwise would be to bring the subsequently created securities up to an equality with the mortgages held by mortgagees who had vested and indefeasible interests at the time of the passing of the Act. Therefore, the result is this, that as regards the Act of 1877 the securities created after the passing of the Act should as to interest all rank *pari passu*. The only point about which there could be a doubt is that there was £25,000 issued under the Act of 1875, but as pointed out by the Vice-Chancellor, and I agree, there never was any security issued under the Act of 1875 alone, it was issued under the two Acts after the passing of the Act of 1877, and it was a security or debenture stock issued after the passing of that Act. Then if it is to rank as it does with the mortgages granted after the passing of that Act, the interest on that is payable subsequently to the interest payable on the debenture stock issued prior to the passing of the Act of 1877.

The result is in substance that the order of the Vice-Chancellor stands. The only alteration that ought to be made is to distinguish between the debenture stock, £25,000 created and issued—and in those words as I have already intimated in the argument there are two words used where one would do, but that is all—created and issued before the passing of the Act of 1875, and that issued under the Act of 1873 after the passing of that Act, and the interest is to rank *pari passu* with that of the mortgages created and issued or granted before that date and then subsisting. The result will be that there will be a declaration that the interest on the £31,000—I think that is the amount of the mortgages—and the £45,000 debenture stock issued under the Act of 1873, before the passing of the Act of 1875, ranks in priority to the interest on those issued subsequently, and that the interest on the £163,675 comes next in priority and before the debenture stock issued after the passing of the Act of 1877. Altered in that way the declaration will be in conformity with the sections. But the alteration is not in favour of the Appellant —it is an alteration between the two Respondents; therefore, so far as the Appellant is concerned, it is not to alter the costs of the appeal, but we must reserve that question till we have heard the cross appeal.

Prior:—Will your Lordships make a distinction as to the £9270? No one is here to represent it. I appear for the company, and we are anxious to have it right.

JESSEL, M.R.:—There is no distinction between that stock and the other debenture stock issued after the Act of 1877.

BAGGALLAY, L.J.:—

I agree with the opinion expressed by the Master of the Rolls, and I shall best express my reasons for that opinion by referring to the amounts of the various stocks. Under the original Act of 1873 the company were authorized to borrow £250,000 by mortgage. They had power also to raise debenture stock in accordance with the provisions of the general Act of 1863. I may here mention that the provisions of the general Act were modified by the provisions of the special Act of 1873, for under the general Act of 1863 the interest on debenture stock would have been postponed to interest on mortgages, but in the Act of 1873 it was provided that "the interest of all debenture stock at any time created and issued by the company shall rank *pari passu* with the interest of all mortgages at any time granted by the company." The company exercised its powers of borrowing to the full; it borrowed about £226,000 on mortgage, and the balance by issue of debenture stock. But before the passing of the Act of 1875 they had raised, by a further issue of debenture stock, sufficient to reduce the amount of those mortgages, and at the time when the Act of 1875 was passed there was about £45,000 of debenture stock and about £204,000 still remaining out on mortgages. In that state of circumstances the Act of 1875 was passed, which authorized the raising of a further sum of £25,000 by mortgage, and provided that the principal moneys secured by mortgages granted before the passing of that Act should have priority over the principal moneys secured by mortgages granted by virtue of the Act; it also contained a provision that, notwithstanding anything contained in the general Act of 1863, the interest of all debenture stock at any time after the passing of the Act of 1875 created and issued by the company should rank *pari passu* with the interest of all mortgages at any time after the passing of the same Act granted by the company. Now, had it not been for the passing of the Act of 1875, the interest of all the subsequently issued debenture stock would have ranked *pari passu* with the interest on the mortgages created under the Act of 1873, but directly it came into operation it had the effect of postponing the interest on any debenture stock created and issued after the passing of that Act to the interest on debenture stock created prior to its passing. The £25,000 authorized by that Act to be raised on mortgage was not raised. However, in the interval between the passing of the Act of 1875 and the passing of the Act of 1877 a very considerable amount of additional debenture stock was issued, to the amount of about £163,000, and was applied to the paying off of a corresponding amount of mortgages. The consequence was that when the Act of 1877 was passed the state of the borrowed money was this: there was about £45,000 and £163,000 remaining of debenture stock, and there was also a sum of something like £41,000 outstanding on mortgages. The provision of the Act of 1875, as far as regards the postponement of the interest on debenture stock, was repeated in the Act of 1877, and exactly in the same way as the debenture stock created after the passing of the Act of 1875 and before the passing of the Act of 1877 was postponed to the debenture stock created prior to 1875 and to mortgages then existing and still subsisting, the interest of the debenture stock created after the passing of the Act of 1877 was postponed to the interest of the debenture stock created in the interval between the passing of the two Acts of Parliament. Therefore, we arrive at this conclusion, that the mortgages which now amount only to £31,000 odd, a small portion having been paid off those mortgages, and the debenture stock to the amount of £45,000 odd, which was created prior to 1875, stand first as far as regards their right to interest. Next to that small amount of mortgages comes the large amount of debenture stock which was created in the interval between the two Acts of 1875 and 1877, and, lastly, comes in the order of priority the interest upon the £125,000 debenture stock which was issued under the two Acts of 1875 and 1877, and also the £9270 debenture stock which had been raised for the purpose of paying off mortgages. It appears to me the three priorities are very clearly distinguishable in that way.

LUSH, L.J. :—

I am entirely of the same opinion. I do not think the 14th and 15th sections of the Act of 1875, and the sections set out of the Act of 1877, admit of any other construction than that given by my learned Brothers. I therefore agree that the debenture holders are classified into three classes, and take according to their priorities at the date of the issue of their debentures. Those that were issued before the Act of 1875 first take, those that were issued after the Act of 1875 come in next, and those that were issued after the Act of 1877 come in after.

W. Pearson, Q.C., and *Norton*, for the Defendant *Brassey*, on the cross-notice of appeal, contended that the principal of the mortgages also had priority over the debenture stock created after the passing of the Act of 1875.

Benjamin, Q.C., and *Kekewich*, Q.C. (*Stirling* with them), for the Plaintiffs :—

After the decision of the Court on the question of interest we cannot resist the appeal as to the principal.

JESSEL, M.R. :—

Our decision as to the interest has in fact decided the question as to the principal.

But this raises a very curious point as to costs, which, however, I think we can settle on principle. Under the present practice a notice is equivalent to a cross-appeal. It is a mere accident whether Mr. *Pearson's* clients presented their appeal first or Mr. *Medd's* client, because if Mr. *Pearson's* clients had been first we should have got the notice from Mr. *Medd's* client, therefore there really is an appeal and a cross-appeal. I do not know how to divide the costs except equally. The result will be that the Appellant represented by Mr. *Medd* will pay half the costs of all the Respondents, and the Respondents represented by Mr. *Kekewich* will pay the other half of the other Respondents.

[illegible]

BAGGALLAY and LUSH, L.JJ., concurred.

Solicitors: *Murray, Hutchins, & Stirling*; *Cope & Co.*; *Maples & Teesdale*; *Norton, Rose, Norton, & Brewer.*

M. W.

EAMES *v.* HACON.

[1880 E. 21.]

C. A.
1881
June 24, 27.

Foreign Assets—Title of Administrator—Limited Administration granted to Attorney of Principal Administrator.

22 Ch D 461

E. having died in *Ireland* intestate, letters of administration were granted in *Ireland* to the Plaintiff. Part of his assets being in *India*, the Plaintiff sent out a power of attorney to *F. & Co.* in *India*, who procured letters of administration to be granted to them in *India* for the use and benefit of the Plaintiff, received the Indian assets, paid the Indian debts, and remitted the surplus to their agents in *England*. The Irish letters of administration were sealed in *England*:—

Held, that the agents in *England* were bound to hand over the fund to the Plaintiff, and could not require the concurrence of the next of kin, they not having taken any legal proceedings to prevent the Plaintiff from receiving the assets.

Decision of *Fry*, J. (1), affirmed.

THIS was an appeal by the Defendants from a decision of Mr. Justice *Fry* (1).

The Plaintiff, *Henrietta Eames*, was the widow of the Rev. *W. L. Eames*, who died in 1877 in *Ireland*, intestate and entitled to personal estate in *India*, where he had been a chaplain in the *Bombay* establishment.

On the 24th of November, 1877, letters of administration to the estate of Mr. *Eames* were granted to the Plaintiff by the Probate Division of the High Court of Justice in *Ireland*.

On the 6th of September, 1878, the Plaintiff executed a power of attorney authorizing *J. A. Forbes*, *C. B. Forbes*, and *W. G. Mayhew*, of the firm of *Forbes & Co.* of *Bombay*, to take out letters of administration to the personal estate of Mr. *Eames* in *India*.

On the 30th of April, 1879, letters of administration to the personal estate of Mr. *Eames* in the *Bombay* Presidency were granted by the Court of Judicature at *Bombay* to *J. A. Forbes* and *C. B. Forbes*, therein described as two of the duly constituted attorneys of *Henrietta Eames*, widow and administratrix in *England* of the personal estate of Mr. *Eames*, "for the use and benefit of the said *Henrietta Eames* limited until she shall obtain letters of administration granted to her and limited until some will of the said deceased be found and deposited in this Court or the contents of the same be duly proved, but no further or otherwise, you having been first sworn well and truly to administer the same according to law and to pay all the lawful debts of the deceased so far as his effects will extend, and also to exhibit to this Court a true and perfect inventory," &c.

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(1) 16 Ch. D. 407.

In June, 1879, the Defendants, who were the agents in *England* of *Forbes & Co.*, received from *Forbes & Co.* a remittance of £196 14*s.* 4*d.*, with a letter stating that it was the balance due from them to the estate of Mr. *Eames*, and requesting the Defendants to make it over to the party entitled thereto on being furnished with a satisfactory release duly executed.

Mrs. *Eames* having applied to the Defendants for payment of this sum, a long correspondence took place, in which the Defendants alleged that Mrs. *Eames* could not give a good discharge to the Indian administrators for the balance, and that the concurrence of Mr. *Eames*'s children was requisite. The children were minors. The Defendants declining to pay over the fund to Mrs. *Eames*, she, in February, 1880, commenced her action against the Defendants, alleging that the Irish letters of administration were in the possession of the Defendants, who refused to give them up to her, and that owing to such refusal she had been unable to procure them to be sealed by the Probate Division in *England*, and asking that the Defendants might be ordered to pay over the £196 14*s.* 4*d.* to the Plaintiff, and to deliver to her the letters of administration.

The Defendants, by their statement of defence, alleged that Mrs. *Eames*, as Irish administratrix, was not competent to give a discharge for the moneys received by the Indian administrators, and that the Defendants therefore were not justified in paying the fund to her. They further alleged that if the Plaintiff had the letters sealed by the Probate Division in *England* she would still be incompetent to give a discharge for the money. They further stated that they and the Indian administrators were willing to pay over to the Plaintiff her share of her husband's estate and to deal with the shares of his children as the Court should direct in a properly constituted action for the administration of Mr. *Eames's* estate, or, if the Court should so direct, the Indian administrators were willing to pay the shares of the children into Court under the *Legacy Duty Act* or the *Trustee Relief Act.* The Defendants submitted that the Indian administrators were necessary parties to the present action.

The Irish letters of administration were delivered to the Plaintiff, and on the 8th of June, 1880, she procured them to be sealed by the Probate Division in *England*, and the statement of claim was amended by alleging that this had been done.

The action was tried by Mr. Justice *Fry* on the 6th of December, 1880, when his Lordship gave a judgment, by which, after referring (*inter alia*) to the letters of administration granted in *Ireland* and sealed in *England*, it was declared that the Plaintiff as such administratrix was entitled to receive and competent to give a good discharge for the moneys in the hands of the Defendants in question in the action, and that the Indian administrators were not necessary parties thereto. The judgment went on to order payment to the Plaintiff accordingly, and ordered the Defendants to pay the costs of the action (1).

The Defendants appealed. The appeal came on to be heard on the 24th of June, 1881.

Cookson, Q.C., and *Methold*, for the Appellants:—

There are two questions in this case—whether, admitting the Irish Court to be the Court of the domicil of the intestate, the Plaintiff can give a good discharge to the Defendants; and, secondly, whether the intestate was really domiciled in *Ireland* at his death. As to the first point, we rely on *Chambers* v. *Bicknell* (2) and *Attorney-General* v. *Köhler* (3), which shew that the limited administrators can be sued by the next of kin. The Plaintiff therefore cannot give us such a receipt as will protect us from their claim. The case is like that of there being one administrator in *England* and another in *Scotland.* If the Scotch administrator keeps a banking account in *England* on behalf of the

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(1) 16 Ch. D. 407.

(2) 2 Hare, 536.

(3) 9 H. L. C. 654. 8 Jur. N.S. 467

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estate, surely the English administrator cannot lay hold of it. *Currie* v. *Bircham* (1) is against any such claim. The estate must be administered in the country in which legal possession of it is taken: *Preston* v. *Lord Melville* (2). A case may occur where administration is taken out in *England* with security limited to the amount of assets in *England.* Can the representative here then receive large assets from abroad, so that the next of kin will have no security? The Defendants being mere agents are not proper parties to be sued: *Attorney-General* v. *Earl Chesterfield* (3). If they are, they stand in the position of the Indian administrators, and, having acted under advice, ought not to be punished with costs.

North, Q.C., and *C. James, contrà,* were not called upon.

Jessel, M.R.:—

As regards the last point, the Defendants, by their statement of defence, far from setting up the case that they are not proper parties to be sued, state that they are ready to deal with the fund as the Court shall direct in a duly constituted proceeding, and allege that *Forbes & Co.* are necessary parties to the action. As regards this allegation, I am of opinion that Mr. Justice *Fry* was right in holding them not to be necessary parties.

The Plaintiff in this case obtained general letters of administration in *Ireland* to her husband's estate. There being money due to him in *India,* she sent out a power of attorney to *Forbes & Co.* to enable them to take out letters of administration in *India.* They accordingly take out letters of administration for the use and benefit of the Plaintiff till she should obtain letters of administration to be granted to her. Having obtained these letters of administration as her attorneys, they get in the Indian assets and remit a clear balance of £196 14*s.* 4*d.* to the Defendants, with instructions to make it over to the party entitled thereto on being furnished with a satisfactory release. The lady who constituted them her attorneys asks their agents to hand over this balance to her. They refuse. She offers to get the Irish letters of administration sealed in *England*. They reply that this will not enable her to give a discharge. Supposing there to be any technical difficulty in the Plaintiff's way, I think that, considering the smallness of the sum, they would have done well in paying it to her, but as they have thought fit to insist on technical defences, we must decide whether those defences are tenable.

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(1) 1 D. & R. 35.

(2) 8 Cl. & F. 1.

(3) 18 Beav. 596. 18 Jur 686

Forbes & Co. took out administration in *India* for the use and benefit of the Plaintiff, and on what ground can they refuse to pay over the money to their principal? No doubt they, by taking out administration in *India*, made themselves liable to be sued by creditors there, and cannot be called on to pay over anything more than the surplus after satisfying the intestate's Indian liabilities. But what they have sent over to *England* is admittedly an ascertained surplus, and the attorney cannot refuse to pay it to his principal. It is urged that they cannot be called upon to pay the money over, because they are liable to be sued by the next of kin. They may be liable to be sued, but they have not been sued. Assets collected by the agent of a trustee have often been intercepted in the agent's hands by the *cestuis que trust*, but if they take no steps for that purpose the agent is safe in paying the trustee. So here, because *Forbes & Co.* might be sued by the next of kin, it does not follow that they cannot, when they have not been sued, hand over the money to the Plaintiff. The two propositions are not correlative.

But it is said that the learned Judge below has decided the case on a wrong ground, and that there is no reason for saying that an administrator in the country of domicil can receive the assets as against all limited administrators. The learned Judge has not laid down so broad a proposition as is thus objected to; he has only said that the principal administrator is entitled to receive the clear surplus remaining in the hands of the limited administrators, and as a general rule that is true. The Plaintiff is administratrix here and in *Ireland*, and is suing to recover a net surplus which has been remitted to *England* by limited administrators in *India* after payment of all claims in *India*. I am of opinion that, having general letters of administration here and in *Ireland*, she could call on the Indian administrators to pay this balance to her, and that the present action is maintainable.

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There is here *primâ facie* evidence that the domicil of the intestate was Irish, for letters of administration have been granted on that footing. No doubt there are cases in which persons acquire an Anglo-Indian domicil, but there is no shadow of proof that this gentleman ever did so. We have only the facts that he resided in *Ireland* up to the time of his death, and that letters of administration were granted there to his estate, and those who dispute his domicil being Irish should bring forward some evidence tending to shew that his domicil was elsewhere. But it is not necessary to decide that question. I prefer to rest my decision on this, that the letters of administration in *India* were granted to *Forbes & Co.* only as the Plaintiff's attorneys, and that they may safely pay her as being their principal. The point is not a new one, it was decided in *De la Viesca* v. *Lubbock* (1), the authority of which case has never, so far as I am aware, been doubted or questioned. In that case, during litigation in a Spanish Court as to which of two testamentary papers of a deceased Spaniard ought to be established, the plaintiff was appointed by the Spanish Court the judicial administrator of the goods of the deceased. He therefore was the principal administrator. He appointed the defendant, who was in *London*, to receive from a *London* firm all such moneys of the deceased not exceeding £11,000 as might be in their hands. The Ecclesiastical Court granted letters of administration to the defendant "as the lawful attorney of the said Don *Jose de la Viesca* limited to receive from the said Messrs. *James Campbell & Co.* all such amount of pounds sterling as they may have in their hands belonging to said testamentary estate of the said deceased, provided the same does not exceed £11,000, and in case the property of the said deceased now remaining in their hands should exceed the said sum of £11,000, then to receive so much only thereof as shall amount to the sum of £11,000 and no more for the use and benefit of the said Don *J. de Viesca*, and until he shall duly apply for and obtain letters of administration of the goods, chattels, and credits of said deceased to be granted to him." There is no substantial difference between the limited letters of administration in that case and in the present; in that the grant was made to the party as the attorney of the plaintiff; in the present case *Forbes & Co.* are referred to as the attorneys of the Plaintiff, and the grant is made to them for her use and benefit. There the plaintiff filed a bill to compel payment to him by the limited administrator. The decision only is given that the defendant was bound by the recital in the letters of administration, and that they were granted to him expressly as the agent of the plaintiff, and that, therefore, he might safely pay to the plaintiff the sum he had received. The plaintiff there had not obtained letters of administration in *England*. This decision is in point, and is sound in principle. It was urged that we ought to relieve the Defendant from costs. In any case where a decision is right it would be a strong thing to interfere with the order as to costs, even if we were inclined not to agree with it; but I think that the order as to costs is quite right. If people choose to raise technical objections as to such a small sum and fail, they ought to pay costs.

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(1) 10 Sim. 629.

BAGGALLAY, L.J.:—

I entirely agree with the Master of the Rolls, and do not think it necessary to add anything. The Plaintiff is entitled to payment whether we regard her as the general legal personal representative, or as the person for whose benefit the limited letters were granted.

LUSH, L.J.:—

I am of the same opinion. It appears that the Defendants acted under advice, but unfortunately they were ill-advised. I think that the judgment may be sustained on the ground of the relation of principal and agent—the limited administration having been granted to *Forbes & Co.* as attorneys for the Plaintiff. Apart from this, I think the judgment right on the ground that the Plaintiff was the duly constituted legal personal representative. Looking at the judgment of Mr. Justice *Fry* as it appears in the report, it might have been supposed that his Lordship was not aware that the letters had been sealed in *England*, and that he intended to decide that the Irish administratrix, without that having been done, could assert her title to assets in *England*. That would have been wrong, but I do not think that the learned Judge intended to decide it, for it appears on the face of his order that the letters of administration had been sealed in *England*, which makes them equivalent to letters granted in *England*. I think, therefore, that the decision was right. The Plaintiff had a right to receive the assets here, and the Defendants cannot set up any title in the next of kin, as the next of kin have not taken any legal proceedings to prevent the assets from coming to the Plaintiff's hands.

Solicitors: *J. Wilkinson; Hacon & Turner.*

H. C. J.

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FRY, J.
May 19.
C. A.
June 29.

DAWES *v.* TREDWELL.

[1881 D. 37.]

Marriage Settlement—After-acquired Property—Covenant to settle—Separate Use.

By a marriage settlement, after a recital that on the treaty for the marriage it was agreed that all real and personal property which during the coverture should devolve upon or vest in the wife or the husband in her right to the value of £200 at any one time should be settled upon the trusts thereinafter declared, it was witnessed that it was thereby agreed and declared between and by the parties thereto, and the husband thereby covenanted with the trustees that if at any time during the coverture any real or personal estate should devolve on or vest in the wife or the husband in her right to the amount in value of £200 at any one time, the husband would make, do, and execute, or cause and procure to be made, done, and executed, and join and concur in making, doing, and executing all such conveyances, &c., as would effectually vest such real and personal estate in the trustees upon the trusts therein declared. After the marriage, a deed was executed by the wife's mother, under which, during the coverture, a sum exceeding £200 became payable to the wife for her separate use:—

Held, by *Fry*, J., that this sum was within the covenant, and must be settled.

Held, by the Court of Appeal, that as the operative part of the deed was clear, the recital could not control it—that as the operative part of the deed only related to acts to be done by the husband, the agreement and declaration between and by the parties that those acts should be done did not import a covenant by any other party that they should be done, and that there was, therefore, no covenant by any one but the husband—that the covenant by him could not be held to relate to property over which he had no power and in which he had no interest—and that the wife, therefore, was not bound to bring into settlement property given to her separate use.

BY a settlement dated the 29th of October, 1866, expressed to be made between *William Tredwell* of the first part, *Kate Tred-*

well, spinster, an infant daughter of *William Tredwell*, of the second part, *William Henry Dawes* of the third part, and three trustees of the fourth part, it was recited as follows :—

"Whereas a marriage hath with the approbation of the said *W. Tredwell* been agreed upon and is intended to be forthwith solemnized between the said *W. H. Dawes* and *Kate Tredwell*, and upon the treaty for such intended marriage it was agreed that the said *W. Tredwell* should transfer to the said trustees as his daughter's marriage portion the sum of £10,000 as represented by 1000 shares in, &c., to be held by them upon the trusts hereafter declared, and that the said *W. H. Dawes* should insure his life in the sum of £5000, and transfer the policy to the said trustees, to be held by them upon the trusts hereinafter declared, and that all real and personal property (except only clothes, jewels, and personal chattels) which during the said intended coverture shall devolve upon or vest in the said *Kate Tredwell* or the said *William Henry Dawes* in her right to the extent in value of £200 at any one time should be settled upon the trusts hereinafter declared concerning the same." After provisions relating to the property settled by the wife's father and the policy of insurance, came the following witnessing part :—

"And this indenture lastly witnesseth that in pursuance and further performance of the said agreement, and in consideration of the said intended marriage, it is hereby agreed and declared between and by the parties to these presents, and the said *William Henry Dawes* doth for himself, his heirs, executors, and administrators, covenant with the parties hereto of the fourth part, their executors, administrators, and assigns, that if at any time during the said intended coverture any real or personal estate (other than and except clothes, jewels, and personal chattels) shall descend and devolve upon or vest in the said *Kate Tredwell*, or the said *William Henry Dawes* in her right, to the amount in value of £200 at any one time, for any estate or interest whatsoever, then and in such case and as often as the same shall happen, he, the said *William Henry Dawes*, will immediately thereupon, at the costs and charges of the said trust estate, make, do, and execute, or cause and procure to be made, done, and executed, and join and concur in making, doing, and executing all such conveyances and assurances, assign-

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ments, acts, deeds, matters, and things as will effectually vest all such real and personal estate in the trustees or trustee for the time being of these presents, upon the trusts following (that is to say)," &c., &c.

After the settlement and marriage certain property was, by an indenture of the 1st of January, 1878, directed by the mother of Mrs. *Dawes* to be held upon certain trusts, under which a sum of money exceeding £200 became, during the marriage, payable to Mrs. *Dawes* for her separate use.

The present action was commenced by Mrs. *Dawes* against her husband and children for the execution of the trusts of the settlement, and on the 22nd of March, 1881, a summons was taken out by the children to obtain a decision whether Mrs. *Dawes* was put to her election as to the property directed by the indenture of the 1st of January, 1878, to be held in trust for her separate use.

The summons was heard before Mr. Justice *Fry* on the 19th of May, 1881.

Lewin for the summons :—

The agreement and declaration that after-acquired property should be settled was made by all parties, including Mrs. *Dawes*, and she, but for her infancy, would have been bound by it: *Lee* v. *Lee* (1). Therefore the whole of the wife's after-acquired property was to be settled, which includes property coming to her for her separate use: *Butcher* v. *Butcher* (2); *Campbell* v. *Bainbridge* (3). Mrs. *Dawes*, who elects to take under the settlement, is bound by the arrangement, although at the date of the settlement she was an infant: *Willoughby* v. *Middleton* (4).

Beale for Mrs. *Dawes* :—

This case is governed by *Ramsden* v. *Smith* (5), which case was recognised and distinguished in *Butcher* v. *Butcher*, *Campbell* v. *Bainbridge*, and *Lee* v. *Lee*. So, in *Young* v. *Smith* (6), where there was a recital of an agreement that after-acquired property should be settled, it was decided that the wife was not bound by the covenant: *In re Webb's Trusts* (1); *Kane* v. *Kane* (2).

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(1) 4 Ch. D. 175.
(2) 14 Beav. 222.
(3) Law Rep. 6 Eq. 269.
(4) 2 J. & H. 344. 8 Jur. N.S. 1055.
(5) 2 Drew. 298. 18 Jur. 566
(6) Law Rep. 1 Eq. 180. 11 Jur. N.S. 96
35 Beav. 87.

Willis Bund, for the Defendants to the action.

FRY, J., after reading the recital in the settlement and witnessing part above stated, continued :—

It is obvious from what I have read that this covenant is intended to include all property which shall during the marriage vest in the intended wife, or which shall during the same period vest in the intended husband in her right; and the husband covenants that he will do and concur in doing everything that may be necessary for vesting such property in the trustees of the settlement. But how is he to vest in the trustee property which during the marriage vests in the wife? Of course he can do no such thing, and all that he can do is to concur in the wife's vesting such property in the trustees. Now, the wife is one of the parties to the settlement, and, as such, has agreed with the other parties thereto in the terms of the husband's covenant, and what can that mean but that she will do and concur with the husband in doing all that may be necessary to vest the property in the trustees?

I have this alternative before me, I must either cut down the description of property to be dealt with to such property only as the husband can deal with alone, or I must hold that the words by which he covenants to concur in doing what is necessary operate to bind all the parties to the said settlement whose concurrence is necessary, including the wife, and so enlarge the effect of the covenant. In order to clear up the ambiguity which thus exists in the operative part of the settlement, I must consider the language of the recital, and when I do so I find that what is recited is that there is an agreement that property coming to the intended wife, or to the intended husband in her right, shall be settled. That shews the intention of the parties, and effect can be given to that intention only if the wife is bound equally with the husband to settle such property. I therefore decide that the property now in question is subject to the covenant for settlement of after-acquired property. In coming to this conclusion I assume

(1) 46 L. J. (Ch.) 769.

(2) 16 Ch. D. 207.

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the statement to be correct that the wife has elected, or now elects, to take under the settlement. If that is not so the case must be mentioned again.

Mrs. *Dawes* appealed. The appeal was heard on the 29th of June.

Beale, for the Appellant:—

Apart from the recital, this case is governed by *Ramsden* v. *Smith* (1), which was recognised in *Campbell* v. *Bainbridge* (2). There is merely a covenant that the husband shall do certain acts, and that cannot bind property which the wife takes for her separate use. The recital does not alter the case; it is a mere general recital, which ought to be construed as only referring to the covenant; and, even if it were more precise, it could not control the plain terms of the covenant.

Romer, Q.C., and *Lewin*, *contrà*:—

Butcher v. *Butcher* (3) indicates the principle which is the keynote to a line of cases, that if it can be gathered from the instrument that all parties agree that the property shall be settled, it must be settled. The covenant in the present case is not clear, and the recital may be used to explain it.

[JESSEL, M.R.:—"It was agreed" cannot mean that the wife agreed, for she was a minor.]

Campbell v. *Bainbridge*, referred to on the other side, is in our favour.

[JESSEL, M.R.:—In that case it was expressed that the property was to be conveyed by the husband and wife.]

We rely on the recital as substantially expressing the same thing.

JESSEL, M.R.:—

This case, apart from the recital, is identical with *Ramsden* v. *Smith*. Now the rule is, that a recital does not control the operative part of a deed where the operative part is clear. The

(1) 2 Drew. 298. 18 Jur. 566
(2) Law Rep. 6 Eq. 269.
(3) 14 Beav. 222.

recital here, as is usually the case, is in general terms; the operative part is in definite terms. There is another rule that the recital of an agreement does not create a covenant where there is an express covenant to be found in the witnessing part relating to the same subject-matter. If, therefore, the covenant is clear, it cannot be controlled or affected by the recital. Now it appears to me that the covenant is quite clear. First of all, whose covenant is it? No doubt there are the words "In pursuance and further performance of the said agreement, and in consideration of the said intended marriage, it is hereby agreed and declared between and by the parties to these presents, and the said *William Henry Dawes* doth for himself, his heirs, executors, and administrators, covenant with the said parties hereto of the fourth part," &c. But the rule is, that where you have such words as "it is hereby agreed and declared between and by the parties to these presents," that some one will do an act or make a payment, and that some one is a party to the deed, it is a covenant by him with the others, not a covenant by all of them. Anything more absurd than to hold it a covenant by all of them could not be imagined. Suppose you had these words, "Provided always it is hereby agreed and declared between and by the parties to these presents that the said *A. B.* shall pay £5000 to the said *C. D.* on the 6th of January next," it would be absurd to say that this amounts to a covenant by *C. D.*, the recipient of the money, that *A. B.* shall pay him, as well as a covenant by *A. B.* that he will pay him. If, therefore, we find that no act is to be done except by one of the parties, these words only amount to a covenant by that one party with the others. Now, in this particular instance no act is to be done except by the husband, for the operative part only provides "that if at any time during the said intended coverture any real or personal estate (other than and except clothes, jewels, and personal chattels) shall descend and devolve upon or vest in the said *Kate Tredwell*, or the said *William Henry Dawes* in her right, to the amount in value of £200 at any one time, for any estate or interest whatsoever, then and in such case, and as often as the same shall happen, he the said *William Henry Dawes* will immediately thereupon, at the cost and charges of the said trust estate, make, do, and execute, or cause and procure to be made, done, and executed, and join and concur in making, doing, and executing all such conveyances and assurances, assignments, acts, deeds, matters, and things, as will effectually vest all such real and personal estate in the trustees or trustee for the time being of these presents." If, then, it is a covenant by the husband that he will do certain things, can the covenant be construed so as to include anything but what he can do? Is it to be supposed to be in the contemplation of the parties that he covenants to convey property over which he has no power of disposal and in which he has no interest. It cannot be imagined that such was the intention of the parties, or that any gentleman about to become a husband would bind himself either to cajole or coerce his wife into conveying her separate property to the uses of the settlement, which is what must be alleged by those who say that this covenant is to apply to the separate property. That is not the meaning of it: the covenant, to my mind, is plain, and I consider it clear beyond doubt that the husband has only agreed to do what he has power to do.

Now he can do two things. If the property vests in him by law, which is the case with a great deal of personal property, or if he has the power of disposition by law, as in the case of leaseholds, he is to assign it. If it is real estate it vests in the wife, not in him, but he has an interest in it and has a power of concurring with her in conveying, and he is bound to convey his interest and to join with her in conveying the whole property if she is willing to do so, but the covenant does not affect property as to which he has no control whatever. That being so, and the covenant being clear, you cannot go back to the recital to give it any effect, and even if you could, it appears to me that the recital, if carefully looked at, does not much help the Respondent's case.

First of all it is stated on the face of the instrument that the lady is an infant. Then it is stated that upon the treaty for the marriage it was agreed. Now of course an infant could not make an agreement; it was not her contract, but it must have been a contract between her father on her behalf and the intended husband. Then the agreement is stated to be "That all real and personal property (except only clothes, jewels, and personal chattels) which during the intended coverture shall devolve upon or vest in the said *Kate Tredwell* or the said *William Henry Dawes* in her right to the extent in value of £200 at any one time should

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be settled upon the trusts hereinafter declared concerning the same." Does that amount to more than this, that the covenant hereinafter inserted is to be inserted? It does not appear to me that it amounts to more than that, or that there is really any inconsistency between the terms of the recital and the terms of the covenant, though if there were I should hold that the covenant was to be followed and not the recital. This case, as it seems to me, was concluded by authority binding on the learned Judge in the Court below, and in my opinion the existence of the recital is no ground for distinguishing the case from *Ramsden* v. *Smith* (1) and the other authorities. This appeal, therefore, must be allowed.

BAGGALLAY, L.J.:—

In my opinion the covenant in this case is undistinguishable from that in *Ramsden* v. *Smith.* That decision was pronounced nearly thirty years ago and has never been disputed or doubted, but has been constantly followed and acted upon; if it had been a recent case I should have arrived at the same conclusion as the Vice-Chancellor, and for the reasons so very carefully expressed by him in his judgment. The only reason which has been suggested why this case should not be treated as governed by *Ramsden* v. *Smith* is that in this case there is the recital which has been so frequently referred to. But, as has been pointed out by the Master of the Rolls, there is no doubt or ambiguity upon the covenant itself, and therefore there can be no reason for any reference to the recital. Even if you were to go back to the recital, it appears to me to amount to nothing more than this, that it has been agreed that such stipulations shall be made as are contained in the operative part.

LUSH, L.J.:—

I am of the same opinion.

Solicitor for all parties: *Spencer Whitehead,* agent for *Whateley, Milward, & Co., Birmingham.*

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(1) 2 Drew. 298. 18 Jur 566

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FRY, J.

May 12.

C. A.

June 29.

REAL AND PERSONAL ADVANCE COMPANY *v.* McCARTHY.

[1878 R. 228.]

Costs—Defendant—Withdrawal of Defence—Common Law Procedure Act, 1852, *s.* 205—*Rules of Court*, 1875, *Order* XXIII., *r.* 1.

Leave was given to one of two Defendants in an action of ejectment to withdraw his defence on the terms of his paying to the Plaintiffs their costs of the action, "so far as they were occasioned by the said defence of the said Defendant":—

Held, that the only costs which such Defendant was liable to pay under this order were the increased costs occasioned by such Defendant having defended the action; and that he was not liable to pay an apportioned part of the Plaintiff's general costs.

THE Plaintiffs in this case were mortgagees of certain leasehold property, and the action was brought against the mortgagor, and *McCarthy* an assignee from him, and *Smith & Co.*, who were alleged to be in wrongful possession of the property.

The action came on for hearing on the 6th of November, 1879, but stood over that *McCarthy* might put in a reply in another action, being a cross action in the same matter.

On the 7th of January, 1880, *Smith & Co.* took out a summons in Chambers that they might be at liberty to withdraw their defence. This summons came on before Mr. Justice *Fry* in Chambers on the 17th of January, and was adjourned into Court. On the 26th of February, 1881, Mr. Justice *Fry* made an order (1) that *Smith & Co.* should be at liberty to withdraw their defence upon the terms therein mentioned, and "do pay to the Plaintiffs their costs of this action, so far as they were occasioned by the said defence of the said" *Smith & Co.*, down to and including the hearing of the said application in Chambers on the 17th of January, 1880.

Under this order the Plaintiffs brought in for taxation as against *Smith* a bill of costs, including the general costs, omitting only such items as were attributable to the case as against *McCarthy* alone, which bill amounted to £278 14*s.* 2*d.* The Taxing Master refused to allow any costs not specifically caused by *Smith's* defence, and accordingly reduced the bill to £13 6*s.* 8*d.*

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(1) 14 Ch. D. 188.

The Plaintiffs delivered objections to this taxation, which were as follows:—

"That the Taxing Master has incorrectly construed the said order, and has acted upon a wrong principle in disallowing the said items, as upon a true construction of the said order the Plaintiff company are entitled as against the Defendant *Smith* in the alternative, (1) either to the whole of the costs of the action up to the 17th of January, 1880, except so far as the same were occasioned exclusively by the defence of the Defendant *McCarthy;* (2) or to have the costs of the action up to the 17th of January, 1880, except as aforesaid, apportioned and borne equally between and by the Defendants *McCarthy* and *Smith*; (3) or to some other substantial portion of the costs of the action up to the 17th of January, 1880 (except as aforesaid)."

The Taxing Master gave the following reasons for disallowing the objections:—

"In this case I am directed to tax the Plaintiff's costs of action so far as they are occasioned by the defence of one of the Defendants who was allowed to withdraw his defence, and was thereupon dismissed.

"The Plaintiff has objected to my taxation on three grounds, and these objections are annexed hereto.

"I have overruled the objections for the following reasons—

"The objectant's grounds are—

"First, that I ought to allow all the costs except those occasioned by the defence of the other Defendant, but this seems to me the reverse of what I am directed to do.

"Secondly, he says if the above is not the correct view the costs ought to be apportioned between the two Defendants.

"It appears to me that this is not a case of apportionment. The Defendant is specially allowed to withdraw his pleadings by way of defence upon the payment of the costs occasioned by his defence, the Plaintiff being, of course, at liberty to proceed with the action against the other Defendant.

"It is true that if a Plaintiff in a Chancery action makes two claims, and he is ordered to pay the costs, or the Defendant is ordered to pay him the costs occasioned by one claim, the costs would be apportioned; but this is a different case, the Plaintiff claims the same land against two Defendants, one of whom withdraws and is dismissed upon payment of the costs occasioned by his defence, which appears to me to limit the costs to those so occasioned.

"Upon referring to the shorthand notes of the judgment given upon the application for this order, I find that the Judge intended to give such costs as a Plaintiff would be entitled to if the Defendant had in an action of ejectment confessed the Plaintiff's title under the 205th section of the *Common Law Procedure Act*, 1852.

"I have not been able to hear of any case in which costs have been taxed under this section.

"I may, however, observe that according to the Common Law practice there would be no apportionment in such a case, the Plaintiff would either be entitled to all his costs to the date of his confession, or only to the increased costs occasioned to the Plaintiff.

"It will be observed that the 203rd section of the above Act provides that if all the Defendants confess, the Plaintiff may sign judgment for the recovery of possession and for costs, that is, all costs without limit; whereas under the 205th section he is to recover the costs occasioned by the defence, which must be less than all, and is therefore, according to the term used at Common Law, the increased costs.

"The case *Johnson* v. *Mills* (1) seems to me to confirm this view. In that case one Defendant, instead of acting under the 205th section, merely gave notice he should not appear, and the Plaintiff proceeded to trial against him and the other Defendants, and judgment was given against all.

"It was held that this Defendant, who did not appear, was with the others liable for all the costs. The Judge says the Defendant had the power to relieve himself from any general costs of the action by availing himself of this 205th section, in which case he would only be liable for the costs occasioned by his particular defence.

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(1) Law Rep. 3 C. P. 22.

"The third reason given by the Defendant does not appear to me to affect the question of the construction of the order. If the Plaintiff is only entitled to the extra or increased costs this is equally the case whether he gets much or little.

"It appears to me the Plaintiff must be entitled either to all his costs against the confessing Defendant, or only to the extra costs, and if entitled to all, the words 'occasioned by' are superfluous, and if he is not entitled to all, he can only be entitled to the extra or increased costs."

The Plaintiffs took out a summons to review the taxation, which was adjourned into Court, and came on for hearing before Mr. Justice *Fry* on the 12th of May, 1881.

Cookson, Q.C., and *Creed*, for the summons:—

The principle of Order XXIII., rule 1, which allows a plaintiff to discontinue an action on payment of the defendant's costs, or if the action be not wholly discontinued, the defendant's costs occasioned by the matter withdrawn ought to be followed.

Smith should pay the Plaintiffs the general costs, except such as were incurred through his co-Defendants: *Johnson* v. *Mills* (1).

[FRY, J.:—The important part of the judgment in that case for the present purpose is where Chief Justice *Bovill*, dealing with the 205th section, says (2) that it is competent for one of several Defendants, after he has appeared to defend for part, to confess the title of the Defendant as to the part for which he has appeared, and in that case he may relieve himself from the general costs of the cause.]

In that case, if the Defendant had been interested in the whole of the subject-matter of the action, as *Smith* is here, he would have been liable for the general costs.

Each Defendant is jointly and severally liable to the whole of the costs of the defence.

North, Q.C., and *Speed*, were not called on upon this point.

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(1) Law Rep. 3 C. P. 22.

(2) Law Rep. 3 C. P. 24.

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Real and Personal Advance Company v. McCarthy.

Fry, J., after reading the order of the 26th of February, 1881, continued:—

The Taxing Master has allowed to the Plaintiffs under the order only so much of the costs as represents the increase of the costs of the defence occasioned by *Smith* having been a Defendant. The Plaintiffs say that he ought to have allowed them the general costs of the action, omitting only such items as are attributable solely to the defence of the other Defendants. The words used in the order are the same as those used in the 205th section of the *Common Law Procedure Act*, and I intentionally used the same words in order that the measure of relief might correspond with what it would have been, if the order had been made under the Act. It appears to me that in *Johnson* v. *Mills* (1) those words used in that section of the Act have received judicial interpretation, and that the effect of an order made on the application of a defendant under this section of the Act is to relieve him from the general costs of the cause, and to leave him liable only for the costs specially occasioned by his defence. In the case of *Johnson* v. *Mills* no doubt the Defendant did not relieve himself. The Defendant there was sued in respect of a part only of the land in question. That appears to me to make no difference, because it is quite plain that upon this principle each Defendant might relieve himself from the costs of the action in so far as it related to his particular part of the action. If one can do it, all can do it. The result would be that each would relieve himself from the general costs of the action, leaving the Defendants continuing the defence liable to those general costs.

That being so, it appears to me to be plain in the present case that the same principle ought to apply, and that the effect of the order which I made was to relieve *Smith* from the general costs of the action, and to leave him liable only for the increase of the costs due to his defence. The Taxing Master has proceeded upon that footing, and in so doing he appears to me to have proceeded according to the understanding or practice of the taxing officers in the Common Law Division, and I think that he was right in so doing; at any rate on a question of construction of that sort, which has been the subject-matter of judicial determination, I am not inclined to disturb the decision which has been arrived at.

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(1) Law Rep. 3 C. P. 22.

The Plaintiffs appealed from this decision. The appeal was heard on the 29th of June.

Cookson, Q.C., and *Creed*, for the Appellants:—

The Taxing Master has used the words "so far as they were occasioned by" as if they had been "so far as they have been increased by." The general costs are occasioned by both the defences, and should be apportioned.

[JESSEL, M.R.:—There is a difference between the expressions "costs so far as they have been occasioned by" and "costs occasioned by": how can you reject the words "so far as"?]

Mr. Justice *Fry* relied on *Johnson* v. *Mills* (1); but it tends the other way.

[JESSEL, M.R.:—The observation of Chief Justice *Bovill* on page 25 is against you.]

According to *Seton* (2) there should be an apportionment.

[JESSEL, M.R.:—That is where the costs are occasioned by a particular charge or matter; the rule is not applicable to costs occasioned by a defence. As at present advised I do not think that I should have made the order of the 26th of February in the form in which it is; but it is not under appeal, and we can only take it as it stands.]

North, Q.C., and *Speed*, *contrà*, were not called upon.

JESSEL, M.R.:—

I must say that I do not consider it desirable for the Court of Appeal to encourage appeals from the decisions of a Judge on applications to review the decisions of a Taxing Master. On questions of detail a Taxing Master is more likely to be able to do justice than a Judge, for the Taxing Masters in taxing a bill have regard to the general nature of the bill. I have heard a Taxing Master say,

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(1) Law Rep. 3 C. P. 22.

(2) 4th Ed. pp. 117, 129.

"When I see that a bill is extravagant, drawn up on the principle of making every charge that is possible, I look at the items very strictly. If I see that a bill is on the whole moderate, and that, though some of the charges are too high, things are omitted which might be charged, I do not look at it with the same strictness." Judges, therefore, are not inclined to encourage appeals from the Taxing Master where no principle is involved. I, therefore, decline to go into the items, for if the details of a bill were to be made the subject of an appeal to this Court the remedy would be worse than the disease.

As regards the general question, we have nothing to do but to construe the order. We are not dealing with a will, but with the order of a Court of Justice, which is to be construed strictly; it was drawn up by the Registrar and settled by lawyers to express the judgment of a lawyer, and we must take it as it stands. The facts of the case are simple. An action was brought against *McCarthy* and *Smith & Co.* to recover the possession of a leasehold property, *Smith & Co.* being tenants to *McCarthy* of the property. The action came on for trial, and the trial was postponed. *Smith & Co.* elected to give up the case, but *McCarthy* continued to defend the action. The order made was that *Smith & Co.* should be at liberty to withdraw their defence, and should pay to the Plaintiffs their costs of the action "so far as they were occasioned by the defence" of *Smith & Co.* down to a certain date. Now, taking those words literally, they cannot include any costs which would have been incurred if *Smith & Co.* had not defended the action. If the Appellants were right in their action they ought to have their whole costs from the Defendants or some of them. But this is a common law action, and at common law there is no such thing as apportionment of costs. There is an apportionment of costs in equity, but it is of quite a different kind—it is an apportionment of costs between different claims. If the Plaintiff got the costs, except so far as they were occasioned by a particular claim, there would be an apportionment of the general costs, for the general costs are occasioned by all the claims. Those rules, however, which prevail in equitable actions have no application to the present case.

BAGGALLAY, L.J.:—

Whether, under the circumstances of this case, the Plaintiffs ought to have had a more favourable order than that of the 26th of February, 1881, is a question not now before us. We can only take that order as it stands, and in my opinion it has not given the Plaintiffs what they contend for. I agree with the Taxing Master that there can be no apportionment either of the whole costs or of the increased costs.

LUSH, L.J.:—

The only question before us is whether the Judge below took a right view of the effect of the order of the 26th of February. There is no appeal from that order, and we are not called upon to say whether it was right or wrong. I can only say that if one of two defendants joined in contesting the plaintiff's claims down to a certain time and then desired to withdraw his defence, I should have to consider all the circumstances of the case before I determined whether he should be allowed to do so at all, and if so, on what terms. If he had induced the other to defend the action I probably should not let him off at all, or only on the terms of his being made liable to the whole costs. Every such case must be governed by judicial discretion exercised with regard to the whole of the circumstances.

Solicitors for Plaintiffs: *Billing & Kent.*
Solicitor for *Smith & Co.*: *C. Sawbridge.*

H. C. J.

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FRY, J.

May 5.

C. A.

June 29.

In re HOPKINS.
WILLIAMS *v.* HOPKINS.

[1878 H. 517.]

Administration—Proof by Secured Creditor—Judicature Act, 1875, *s.* 10—*Bankruptcy Rules*, 1870, *rr.* 99, 100, 101.

19 Ch D 402
20 Ch D 218
— 548
9 QBD 654

An equitable mortgagee obtained a common decree for administration of his deceased debtor's estate, and sent in a claim for the whole amount of his debt. When the certificate of debts came to be settled the mistake was pointed out, and the Chief Clerk required the Plaintiff to put a value on his security. He did so, and was admitted as a creditor for the balance, £28. The estate was then believed to be insolvent, but the fact had not been formally established. After the certificate had become binding the Plaintiff took out a summons asking that the property might be sold, and that he might be allowed to prove for the deficiency. A sale was ordered, and the summons directed to stand over. The property sold for much less than the value set upon it, and the summons was then brought on again:—

Held, by *Fry*, J., and by the Court of Appeal, that by sect. 10 of the *Judicature Act*, 1875, rule 101 of the Bankruptcy Rules of 1870 was made applicable to the case, and that the Plaintiff could only stand as a creditor for £28.

THIS was an action by creditors for administration, the Plaintiffs being bankers at *Dorchester*, and the Defendant being sole executor and residuary devisee under the will of *J. C. Hopkins*, whose estate proved to be insufficient for payment of debts. The testator had a banking account with the Plaintiffs, and in 1852 and subsequently had deposited deeds with them to secure his overdrawn account. He died on the 25th of November, 1876. On the 19th of November, 1878, the Plaintiffs commenced an administration action, and obtained the ordinary decree for administration of the testator's real and personal estate on the 14th of December, 1878. Under this decree they sent in a claim for the whole sum due to them, and the executor admitted it, but the mistake having been discovered, the Chief Clerk, in conformity with the 10th section of the *Judicature Act*, 1875, and the 99th rule under the *Bankruptcy Act*, 1869 (the estate being considered by all parties to be insolvent), required them to set a value on their securities, which they did on the 20th of January, 1880, putting the value at £1800.

S C as to claims of other secured creditors W N 83/13.
48 LQ 495. Fry J

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By the Chief Clerk's certificate, dated the 24th of February, 1880, the Plaintiffs were found creditors for £28 2*s.* 3*d.*, being the excess of £1828 2*s.* 3*d.* over the estimated value of their securities.

The Plaintiffs, fearing that their securities might sell for less than the assessed value, took out a summons dated the 4th of May, 1880, asking that an account might be taken of what was due to the Plaintiffs for principal, interest, and costs upon their security, and that upon the amount due to the Plaintiffs for principal, interest, and costs being ascertained, the property comprised in the deeds and muniments of title deposited with the Plaintiffs might be included in the sale of the testator's real and leasehold estates, and that the money to arise from the sale of that portion of the testator's real and leasehold estates which was comprised in the Plaintiffs' security might be paid into Court, and that in the event of the proceeds of sale of that portion of the testator's real and leasehold estates which was comprised in the Plaintiffs' security being insufficient for the payment of what might be found due to the Plaintiffs for principal, interest and costs, they might be allowed to prove for the balance against the said testator's estate.

The hearing of the summons was adjourned into Court, and the Vice-Chancellor *Malins* ordered the property to be sold, and directed the summons to stand over till after the sale. The property was accordingly sold and realized only £1457. The summons was now brought again before Mr. Justice *Fry* on the 5th of May, 1881.

Glasse, Q.C., and *Cozens-Hardy*, for the Plaintiffs:—

There is no reason why a secured creditor should be called upon to affix a value to his securities in an administration action where the estate is insolvent; for the rules of bankruptcy as to voting, &c., are not applicable to the administration of the assets of a deceased insolvent: *In re Richards & Co.* (1). According to the practice in Chancery, a secured creditor who assesses the value of his security and proves for the balance of his debt is not deprived of his right to apply under rules 78 and 80 of the Bankruptcy Rules, 1870, to have his security realized and then prove for any deficiency.

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(1) 11 Ch. D. 676.

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W. W. Karslake, Q.C., and *Kingdon*, for the Defendant:—

The Plaintiffs might have obtained a decree to enforce their security and to charge the general assets with any deficiency in the form given in *Seton* (1), or they might have applied under rules 78 and 80 for an account and sale of their securities, and then they could have proved for any deficiency, or under rule 99 they might assess the value of their security and prove for the balance. Having elected to take the latter course, they are bound by the value they have put upon their securities; rule 101 precludes them from increasing the amount of their proof: *Findlater* v. *Butler* (2).

Bankruptcy Act, 1869, ss. 6, 12, 40, and rules 136 and 272, are in favour of the Defendant's contention. *Ex parte King* (3); *Lee* v. *Nuttall* (4); *In re Withernsea Brickworks* (5).

Glasse, in reply.

FRY, J.:—

In this case the facts appear to be shortly these: The Plaintiffs are equitable mortgagees of a portion of the estate of the testator, and they have brought this action for the purpose of having the estate of the testator realized, and in December, 1878, the usual judgment in a creditors' action was pronounced. In that action, of course, the Plaintiff had the conduct of the cause. The Chief Clerk's certificate was dated the 24th of February, 1880, and by that certificate the Chief Clerk found that the Plaintiffs were entitled to a sum of £1828 2*s*. 3*d*., in respect of their debt, less the value of the securities held by the Plaintiffs, which were estimated at £1800; that left, therefore, a debt of £28 2*s*. 3*d*. due from the estate to the Plaintiffs.

The Plaintiffs were dissatisfied apparently with their position, and on the 4th of May, 1880, they took out a summons, which is now before me, asking that an account might be taken of what was due to them on their security, that the property comprised in their security might be realized, and that the money might be paid into Court, and that in the event of the proceeds of sale of the portion of the testator's real and leasehold estates comprised in the Plaintiffs' security being insufficient for the payment of what might be found due to the Plaintiffs for principal, interest, and costs, they might be allowed to prove for the balance against the said testator's estate.

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(1) 4th Ed. p. 825.

(2) 5 Ir. L. Rep. 95.

(3) Law Rep. 20 Eq. 273.

(4) 12 Ch. D. 61.

(5) 16 Ch. D. 337.

It appears that when that summons came before the Vice-Chancellor the whole matter was allowed to stand over upon a direction that the property should be sold, and I think that that order must be taken to have been made without prejudice, whether those words were used by the Vice-Chancellor or not, in pronouncing his judgment. The object of allowing it to stand over was to see whether any question would arise: because if the property had realized as large a sum as the Plaintiffs themselves had put upon it, no question would have arisen.

However, unfortunately the property has been sold for £1457. The question before me is this: Are the Plaintiffs to prove for the £28 mentioned in the Chief Clerk's certificate, or are they to prove for the difference between the £1828, their total demand, and the £1457 which has been produced by the sale? That question must be answered by a consideration of the 10th section of the *Judicature Act* of 1875 so far as relates to this matter. That section provides, "That in the administration by the Court of the assets of any person who may die after the commencement of this Act" (which qualification is satisfied in the present action), "and whose estate may prove to be insufficient for the payment of his debts and liabilities, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt." What were the rules or what are the rules applicable in bankruptcy to a case of this sort? They may be shortly stated, as it appears to me, in this way. The rules give a secured creditor an election. He may, if he thinks fit, on the one hand realize his own security; he may call on the Court if he pleases to assist him in realizing that security, and if he realizes that security he proves for the balance remaining unsatisfied after the realization of the security. If he takes that course he is not at liberty to vote or take any part in the proceedings in bankruptcy. Another course open to him, if he has not realized his security, is to put a value on the security. The effect of his doing so is multiform. In the first place he is enabled to vote in respect of the balance of his debt. In the next place, subject to certain provisions with regard to the rectification of the value, the value is taken as binding both for and against him. He can prove against the estate for the balance of his claim, and he can be redeemed at the value which he has put upon his security. Subject, therefore, to certain powers given to the Court to reconsider the propriety of his valuation, that valuation prevails both for and against him.

Now, it appears to me that there is no reason whatever to hold that the same election which the bankruptcy rule has given should not be given in the administration of the estate in this Court, and that appears to me to have been the view of Lord Justice *James*, both in the case of *Lee* v. *Nuttall* (1), to which Mr. *Kingdon* was good enough to refer me, and also in *In re Withernsea Brickworks* (2). I will read only an interlocutory observation of Lord Justice *James* in the former case (3): "The sole object of the section, as it appears to me, was to get rid of the rule in Chancery under which a secured creditor could prove for the full amount of his debt and realize his security afterwards and to put him on the same footing as in bankruptcy, where he was only entitled to prove for the balance after realizing or valuing his security." So that the Lord Justice adverted to the alternative rights of the creditor. It is said, however, that although the power to realize applies, the power to put a value on the security does not arise, and for this reason, that it is immaterial to the proceedings in this Court. No doubt that is so, so far as regards the power of voting, but as regards the power of proving in respect of the balance of the claim after allowing for the security, that observation does not appear to me to apply. Nothing can illustrate that more clearly than the present case, in which the Chief Clerk's certificate has proceeded on that valuation, and has found that £28 is the balance of the Plaintiffs' claim after deducting the amount of the valuation. It appears to me, therefore, I repeat, that the two alternatives equally apply in this Court.

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(1) 12 Ch. D. 61.
(2) 16 Ch. D. 337.
(3) 12 Ch. D. 65.

No doubt there may be in many actions for administration a difficulty in saying at what stage of the proceedings that right arises, because it is not to arise until it is proved that the estate is insolvent; but that question does not appear to me to require solution in the present case, and for this reason, that in my judgment the Plaintiffs have themselves elected to put a value on the security, and I have no doubt, having regard to what appears on the Chief Clerk's certificate, which states that the estate is insolvent, that at the time they did so elect they and every other person treated the estate as being insolvent; and I think that they who elected cannot now be heard to say that they elected before it was proved to be insolvent, because their right to elect only arose when it was proved to be insolvent. It appears to me, therefore, that by taking the certificate in the form in which they have, and not excepting to that certificate, and not attempting to vary it, they have exercised their right of election to treat the property as being of the value of £1800. That being so, I ought not to release them from their election unless under circumstances which prove to me that there has been that mistake which would require the Court to relieve them. I think that the Court does not release persons who have elected under such circumstances, except upon the ground of mistake. If the Plaintiffs had satisfied me that they had been unduly forced to elect by the Chief Clerk before it was proved that the estate was insolvent, or there had been mistake, misapprehension, or miscarriage, the case would be different; but I cannot adjudge that question in their favour on the present summons, which raises no question of the sort. It appears to me, therefore, that all I can do on the present summons is to refuse it, and refuse it with costs. At the same time I will make this observation, that if the Plaintiffs have a case to shew that they elected under undue pressure or by mistake, I do not preclude them by this judgment from bringing forward that case.

The Plaintiffs subsequently took out a summons to vary the Chief Clerk's certificate, on the ground that they had acted under pressure and mistake. The summons was dismissed by Mr. Justice *Fry*. The Plaintiffs appealed from both orders. The appeal was heard on the 29th of June.

Glasse, Q.C., and *Dundas Gardiner*, for the Appellants:—

When the Plaintiffs were called upon to value, the assets had not been proved insufficient to pay debts, and sect. 10 of the *Judicature Act*, 1875, had not become applicable. The Plaintiffs have never proved at all.

[JESSEL, M.R.:—Sending in a claim to the personal representative under the present practice is a proof for this purpose. What claim did you send in?]

A claim for the whole debt, which the personal representative admitted.

[JESSEL, M.R.:—He was wrong in doing so, he ought to have stated that the debt was a secured debt and put the creditor to prove.]

After this, the Chief Clerk required us to value our security; if we had not done so he would have found the Plaintiffs not creditors, and the bill would have been dismissed.

[JESSEL, M.R.:—Your difficulty is this. The certificate finds you creditors for £28. How can you claim any more?]

The valuation was made under pressure. A rule has grown up in Chambers of always requiring a secured creditor to value, which is erroneous, and we were misled by it. The certificate ought to have found us creditors for £1828, less what our security might realize. The 10th section of the *Judicature Act* does not import into administration of assets all the bankruptcy rules: *In re Withernsea Brickworks* (1); *Lee* v. *Nuttall* (2); *In re Albion Steel and Wire Company* (3); and rules 100 and 101 of the Bankruptcy Rules, 1870, ought not to be imported. Their object was that a creditor should not, by valuing his security too low, vote as a creditor to a large amount. There is therefore a penalty on fixing it too low. There is no voting in administration of assets by the

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(1) 16 Ch. D. 337.

(2) 12 Ch. D. 61.

(3) 7 Ch. D. 547.

Court, and no declaration of interim dividends, and the reason for these rules does not apply.

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W. W. Karslake, Q.C., and *Kingdon*, for the Respondent, were not called upon.

JESSEL, M.R.:—

I am of opinion that there is no ground for this appeal, and I regret that there has been a mistake as to the law on the part of the Appellants' advisers.

As regards sect. 10 of the *Judicature Act*, 1875, one object, and probably the principal object of that section, was to get rid of the rule established by *Mason* v. *Bogg* (1) as to proof in Chancery by secured creditors. The Legislature considered it to be absurd that if a trader died the day after being adjudicated a bankrupt his assets should be administered in one way, and if he died the day before the day on which, if he had lived, he would have been adjudicated bankrupt, they should be administered in another way. They had then to consider whether the rule in Chancery or the rule in bankruptcy ought to prevail, and decided in favour of the latter. If the section had plainly said that the assets of a deceased person should be distributed in the same way as in bankruptcy, there would have been no room for dispute, and I think that as regards the particular case with which we have now to deal it has said so. It provides that, in the administration by the Court of the assets of a person who dies after the commencement of the act and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rules shall prevail as to the rights of secured and unsecured creditors, and as to debts and liabilities provable, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt. "May prove to be insufficient" cannot mean shall be proved to be insufficient, for the insufficiency cannot be fully established till afterwards. The words must mean only that there is sufficient reason to believe that the estate will turn out insolvent. If that is the case the rules in

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(1) 2 My. & Cr. 443.

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bankruptcy as to proof are to apply. Now in bankruptcy, under rules 78 and 80 of the General Orders of 1870, a secured creditor has a right, whether his security be legal or equitable, to apply to the Court to have the property sold, to have the proceeds applied in payment of his debt, and to prove for the deficiency. He may take another course. He may, under rule 99, put a value on his security and prove for the balance of his debt after deducting the amount of the valuation, and to check his valuation it is provided by rules 100 and 101 that any amount which the security may realize in excess of the valuation shall be paid over to the trustee, that the trustee may redeem the property at the assessed value, and that if it realizes less than the assessed value the proof shall not be increased. The creditor values for himself, and so he values at his own risk. The check is a very efficient one, for he can gain nothing by valuing too high or too low. In bankruptcy there is no doubt as to the time when the creditor's rights are fixed. He sells and proves for the deficiency, or he values and proves for the balance; in either case the time of sending in his proof is the time when his rights are ascertained. What is the time in administration by the Court? Here also it must be the time of proof. Under the old practice that was when he filed his affidavit of debt. But a new practice has grown up with a view to saving expense. The creditors send in their claims, the executor examines them, and makes an affidavit specifying all which he thinks ought to be allowed. The sending in that claim is the time of proof; the creditor then makes his election. If he does not wish for an immediate sale he sends in a claim for his debt, less the amount of the value which he sets on his security. If he wishes an immediate sale he takes out a summons asking that the property may be sold, and that he may be allowed to prove for the deficiency. The Chief Clerk makes a certificate of debts, and at that time it generally is well known whether the estate is solvent or not. There are exceptional cases, but it is impossible either to legislate for them or lay down rules to govern them. The Chief Clerk must proceed on the footing that the estate is solvent or that it is insolvent, for in one case interest is allowed on debts not carrying interest, and in the other it is not. Until the certificate of debts is made the creditor has a *locus pœnitentiæ*. Up to that time he may alter his proof, but after certificate he is bound, and every one else is bound, unless there are special grounds for setting aside the certificate. So far there is no difficulty—the rules in bankruptcy are followed. The present is a remarkable case, for the creditor, being Plaintiff in an administration suit, had another remedy. He might have obtained at the hearing an order for sale, with liberty to prove for the deficiency. Not wishing, I suppose, to have an immediate sale, he took a common administration decree, which was an assertion that his security was insufficient; for, if not, he had no right to such a decree. He had the conduct of the cause, and was bound to get a certificate not only of the debts of other creditors but of his own. He sent in a claim for the total amount due, which it was irregular to do. Before the certificate was made the error was discovered, and the Chief Clerk required him to value his security, as he had not applied for a sale. He valued it, and, as it turns out, valued it too high, and his proof was admitted for £28, the excess of his debt above the valuation. It may be that his advisers were not aware of the effect of what was done, but the certificate cannot be excepted to merely because a party was ignorant of the effect of an Act of Parliament which had been in force for some years. The Plaintiff took out a summons to have the property sold, and for leave to prove for the balance if the proceeds were insufficient to pay him in full. This application came too late. A sale, however, was ordered, and irregularly ordered, for the property ought to have been sold under the decree, and the summons stood over. The sale took place, and the property realized much less than the value which the Plaintiff had put upon it. The summons was then brought on again, and was properly dismissed. It is the very case contemplated by the 101st rule, which provides that if the security realizes less than the valuation the proof is not to be increased. The valuing the security too high arises from the Plaintiff's own mistake, and he must take the consequences. The judgment of Mr. Justice *Fry* unfortunately suggested to the Plaintiff that there might be a case for setting aside the certificate, for which I cannot see the slightest ground. As to pressure, there was no pressure by the Chief Clerk; he only called upon the Plaintiff to do what the law required him to do.

BAGGALLAY, L.J.:—

At the time when the *Judicature Act* of 1873 was passed the practice as to proof by secured creditors was different in bankruptcy from what it was in Chancery. The preamble to sect. 25 of that Act says that it is expedient to take occasion of the union of the several Courts whose jurisdiction is transferred by the Act to the High Court of Justice to amend and declare the law to be thereafter administered as to the matters thereinafter mentioned. The section then lays down rules for various matters, generally adopting the rules prevailing in Chancery; but sub-sect. 1 is an exception, for it, in some respects, applies the rules in bankruptcy to administration by the Court of the assets of deceased persons. The 10th section of the *Judicature Act*, 1875, re-enacted this subsection with an addition extending it to the winding-up of companies. Now the rules in bankruptcy as to secured creditors are clear. A secured creditor could under rule 78 apply for a sale and prove for the deficiency. Instead of doing this he could, if he thought fit, value his security under rule 99 and prove at once for the balance. Rules 100 and 101 make this a hazardous proceeding, and were perhaps inserted with a view to leading secured creditors to proceed under rule 78, and not under rule 99. Now, according to sect. 10 of the Act of 1875, the rules in bankruptcy are to be applied to proofs by secured creditors. The Appellant was a secured creditor and plaintiff in the action. I doubt whether he could sue except on the ground of having an insufficient security, he certainly could not have instituted bankruptcy proceedings without realizing or valuing his security. He could have obtained a decree for sale with liberty to prove for the deficiency, or under the common decree he could have applied in the same way as a creditor in bankruptcy can apply under rule 78. He did neither, but let the proceedings go on to certificate, and by the certificate he was found a creditor for £28, the difference between his debt and the value set by him on his security, and by that he is bound. There was, in my opinion, nothing to entitle him to relief on the ground of pressure or mistake.

LUSH, L.J.:—

I am of the same opinion, and cannot account for the misapprehension under which the Appellant has laboured. Sect. 10 of the *Judicature Act*, 1875, clearly makes this case subject to the rules in bankruptcy. The Bankruptcy Rules 78, 99, 100, and 101, are exceedingly plain, and they are to be applied to administration of the assets of a deceased person. Under rule 78 the Appellant might have had his security sold and proved for the deficiency, but he did not choose to do so. He then might either keep his security and abandon his proof, or set a value on his security and prove for the balance. He chose the latter course, and was admitted as a creditor for the balance. When he came to sell he found he had made a mistake, and now wishes to increase his proof. What is to be done if a creditor under rule 99 values his security too high? Rule 101 is express that the proof is not to be increased. The Plaintiff had sent in a claim for the whole amount. When the Chief Clerk had to make the certificate of debts, the mistake being pointed out, he said that the Plaintiff must value his security and prove only for the difference. There was nothing in this to be called pressure, the Chief Clerk did no more than he was bound to do.

Solicitors: *Dangerfield & Blythe; John McClellan.*

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New page

Bankruptcy—Liquidation—Estate of Trustee—Notice of Assignment of Chose in Action—Priority—Stop Order—Bankruptcy Act, 1849, s. 141—*Bankruptcy Act*, 1869, s. 22—*Vendor and Purchaser—Doubtful Title.*

A legatee of a reversionary interest under a will, which had been paid into Court in an administration suit, presented a petition for liquidation in March, 1873, and a trustee was appointed. In July he assigned his interest in the legacy to *J.*, who obtained a stop order on the fund in Court. In November, 1876, he assigned his interest to *E.*, without notice of the liquidation, who also obtained a stop order on the fund. Afterwards the trustee in liquidation obtained a stop order. The Plaintiffs purchased the interest of the trustee in liquidation and of *J.*, and contracted to sell the legacy to the Defendant. The Defendant required *E.*'s mortgage to be abstracted as an incumbrance on the estate:—

Held, by *Jessel*, M.R., that *E.* having obtained a stop order before the

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trustee in liquidation, his interest was prior to that of the trustee's, and was an incumbrance on the estate.

In re Bright's Settlement (1) considered.

Held, by the Court of Appeal, that the question of the priority of *E.'s* incumbrance was too doubtful to justify the vendor in omitting it from the abstract; and the decision of the Master of the Rolls was accordingly affirmed.

20 Ch D 476
28 Ch D 347
348.

THIS action was brought to enforce specific performance of a contract for the purchase by the Defendant of the interest of *Joseph Guedalla* in the residuary personal estate of *Judah Guedalla.*

The property was given by the will of *Judah Guedalla* to trustees upon trust for his son *Moses Guedalla* during his life, and after his death upon trust for the wife of *Moses* during her life, and after her death in trust for such of the children of *Moses*, or their issue, born in the lifetime of *Moses*, in such shares and on such conditions as *Moses*, by his last will or any codicil thereto, should appoint, and in default for all the children of *Moses* who should attain the age of twenty-one years or marry under that age.

Judah Guedalla died in 1858, and in the same year a suit was instituted for the administration of his estate, in which a sum of money representing the residuary estate was paid into Court.

On the 19th of February, 1873, *Moses Guedalla* executed a bond binding himself to appoint £5000 at least to his son *Joseph.*

On the 3rd of March, 1873, *Joseph Guedalla* presented a petition for liquidation, which was resolved on by his creditors, and in June, 1873, Mr. *Turquand* was appointed trustee in the liquidation.

On the 17th of July, 1873, *Joseph Guedalla* mortgaged his interest under *Judah Guedalla's* will to *Joel Emmanuel* for securing the repayment of £650.

On the 1st of April, 1875, *Joseph Guedalla* mortgaged, among other things, the same interest, subject to the prior charges made by him, to *W. A. Pope*, for securing £9500.

On the 24th of September, 1875, *Moses Guedalla* died, having by his will, dated the 4th of January, 1873, appointed £5000, part of *Judah Guedalla's* residuary estate after his wife's death, to his son *Joseph.*

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(1) 13 Ch. D. 413.

On the 22nd of October, 1875, *W. A. Pope* obtained a stop order on *Joseph Guedalla's* share of the fund in Court.

On the 8th of November, 1875, *J. Emmanuel* obtained a stop order on the same share.

On the 26th of November, 1875, *Joseph Guedalla* mortgaged his interest in the fund to *H. Elford.*

On the 7th of December, 1875, *Elford* obtained a stop order on *Joseph Guedalla's* share in the fund.

It did not appear that *Elford* had any notice of the liquidation.

On the 20th of March, 1876, *Turquand,* the trustee in the liquidation, obtained a stop order on *Joseph Guedalla's* interest.

The Plaintiffs had purchased the interests of the trustee in the liquidation, and also the interests of *Emmanuel* and *Pope* in *Joseph Guedalla's* reversion, and in May, 1879, they put it up to auction, when it was purchased by the Defendant for £2000. Difficulties having arisen respecting the title, the Plaintiffs brought the present action, claiming specific performance of the contract for sale. The Court directed a reference as to title, and the Chief Clerk reported that the vendors could not make a good title, on the ground that the appointment by *Moses Guedalla's* will was, under the circumstances, a fraud upon the power. This point was decided in favour of the vendors by the Court of Appeal (1).

The mortgage deed of the 26th of November, 1875, to *H. Elford* was not set out in the abstract, and the purchaser made the following requisition: "Mr. *H. Elford's* title to the property to which the stop order of the 7th of December, 1875, related, must be shewn by the vendor at his expense, and Mr. *Elford's* interest or claim must be satisfied or discharged by the vendor."

The vendors' solicitors replied to this requisition that they did not know the particulars of the deed under which *Elford* obtained his stop order: but that the deed and order were both subsequent to the deed and stop order of Mr. *Pope,* and they could not undertake to satisfy or discharge incumbrances overridden by their clients' deeds.

This objection was brought before the Master of the Rolls by a summons taken out by the Plaintiffs.

(1) 15 Ch. D. 294.

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Chitty, Q.C., and *B. B. Rogers*, for the Plaintiffs, contended that the effect of *Joseph Guedalla's* liquidation was to vest the whole of his interest in his trustee absolutely, and that the trustee did not lose his priority over *Elford* by the mere fact of *Elford* having been the first to obtain a stop order: 1 Jac. 1, c. 15, s. 13; 6 Geo. 4, c. 16, s. 63; *Bankruptcy Act*, 1849, s. 141; *Bankruptcy Act*, 1869, ss. 4 ("Property"), 17, 22, 94, 95 (sub-s. 1). *In re Bright's Settlement* (1); *In re Barr's Trusts* (2); *Ex parte Rabbidge* (3); were referred to.

Davey, Q.C., and *Armitstead*, for the Defendant, were not called upon.

JESSEL, M.R.:—

I am clear as to what I ought to decide on the present occasion. Whether, if the present argument had been presented to the Court of Appeal when the previous case of *In re Bright's Settlement* was decided, it would have had any effect or not, it is perhaps useless to consider. In that case the attention of the Court was not directed to the word "debt" in the latter part of the 141st section of the *Bankruptcy Act*, 1849 (4), or to the corresponding section, the 63rd, in the Act of Geo. 4 (6 Geo. 4, c. 16), where it is quite plain that the latter words refer to debts only. There are two separate sentences, and if the attention of

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(1) 13 Ch. D. 413.

(2) 4 K. & J. 219. 4 Jur. N.S. 1073

(3) 8 Ch. D. 367.

(4) 12 & 13 Vict. c. 106, s. 141: "That when any person shall have been adjudged a bankrupt all his personal estate and effects, present and future, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, or be devised or bequeathed or come to him before he shall have obtained his certificate, and all debts due or to be due to him wheresoever the same may be found or known, and the property, right, and interest in such debts shall become absolutely vested in the assignees for the time being, for the benefit of the creditors of the bankrupt, by virtue of their appointment; and after such appointment neither the bankrupt, nor any person claiming through or under him, shall have power to recover the same nor to make any release or discharge thereof, neither shall the same be attached on the debt of the bankrupt by any person according to the custom of the City of *London* or otherwise, but such assignees shall have like remedy to recover the same in their own names as the bankrupt himself might have had if he had not been adjudged bankrupt."

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the Court had been directed to that section as being the parent section, if I may say so, of the section in the Act of 1849, it is not impossible that, having regard to the rule that you may, in matters of legislation referring to the same subject, look back to the prior legislation, the plain construction of the Act of Geo. 4 might have had some effect in inducing the Court to take a different view to what it did take of the Act of 1849. However, *In re Bright's Settlement* (1) was decided on a construction of the section of the Act of 1849, that the negative words therein mentioned did refer to the whole personal estate of the bankrupt, including his equitable *choses in action*; but, in the case before me, I have to deal with the subsequent Act of 1869, the 22nd section of which does not contain negative words at all (2). Therefore I have nothing but vesting words. When I look back to the prior Acts of Parliament, I find this: the statute of *James* (1 Jac. 1, c. 15), which first contained the negative words, contained them in a section, the 13th, which was applicable to debts only. The Act of Geo. 4, though it added to that section by providing, in the first part of the 63rd section, for the conveyance of the whole of the property of the bankrupt to the assignees, in substance copied in the latter part of the section, the Act of *James* as regards the debts; and, consequently, that part of the section also applied to debts only; and it was decided in *In re Barr's Trusts* (3) and *In re Atkinson* (4), that where there are no negative words as to equitable *choses in action*, the mere enactment that the property shall vest, whether on the execution of a conveyance or without any conveyance, does not give the assignee or trustee in bankruptcy a complete title in this sense, that he is postponed to a person who takes an assignment or charge without notice of the bankruptcy and gives notice to the trustees of the

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(1) 13 Ch. D. 413.

(2) The 32 & 33 Vict. c. 71, s. 22, enacts that where any portion of the property of the bankrupt consists in things in action, any writ or other proceeding for the recovery of such things instituted by the trustee shall be instituted in his official name as in the Act provided: and such things shall for the purpose of such action, suit, or other proceeding be deemed to be assignable at law, and to have been duly assigned to the trustee in his official capacity.

(3) 4 K. & J. 219. 4 Jur N S 613

(4) 2 D. M. & G. 140.

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fund before the assignee or trustee in bankruptcy gives notice, thus following the principle in *Dearle* v. *Hall* (1).

In order to decide that question, it was necessary first to consider whether bankruptcy was notice to all the world. Whether the chain of reasoning by which that point was first decided was sound or not, or whether the criticism on the sections of the old Bankruptcy Acts was sound or not, I take to be immaterial now to consider. It was decided not to be notice to all the world; and, there being no subsequent enactment which makes it notice to all the world, it seems to me to be established that it is not notice to all the world.

Then the other question to be considered was whether the effect of bankruptcy was so absolutely to vest all the property of the bankrupt, such as his equitable interest in a fund, in the trustee, that the bankrupt could not divest it. That point was decided really by *In re Atkinson* (2), where it was held, under the *Insolvent Debtors Act* (7 Geo. 4, c. 57), that the title of an assignee for value of an equitable interest was not affected by a previous insolvency of the assignor, the assignee having no notice of that insolvency; and that the assignee in insolvency took the property subject to all equities to which it would be liable in the hands of the insolvent. And in *In re Barr's Trusts* (3) it was decided that the bankruptcy law did not confer a better title than the insolvency law. The result, therefore, is that the bankruptcy of a person entitled to an equitable interest in a fund does not confer a good title on the trustee in bankruptcy without notice to the trustees of the fund as against an incumbrancer from the bankrupt who gives notice. As to the argument addressed to me, that the whole property of the bankrupt vested absolutely in the trustee, that comes to nothing, because that is the case with every absolute assignment, just as much as in bankruptcy. A man makes an assignment of all his property; the effect of the decisions is, that, though it may be a perfectly good assignment as between him and his immediate assignees, yet if, suppressing that assignment, he assigns to somebody else who

(1) 3 Russ. 1.

(2) 2 D. M. & G. 140.

(3) 4 K. & J. 219. 4 Jur. N.S. 1013

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finds the trustees of the property have no notice of that prior assignment, and thereupon gives notice, that second assignee is preferred by reason of the negligence of the first, who has, so to say, lost the benefit of his security—a kind of postponement which we know, upon the doctrine of *Dearle* v. *Hall* (1) and that class of cases, is not confined to equitable *choses in action.* It was argued at one time with considerable force, that whatever negligence there might be in a particular assignee not giving notice, that did not apply to a general assignee or trustee in bankruptcy; but there was no real ground for that argument, and it was in fact overruled in *In re Barr's Trusts* (2), and in *In re Atkinson* (3), where it was decided that the same doctrine applies to the general assignee or trustee.

The result, therefore, in this case, is that, in my opinion, Mr. *Elford's* incumbrance must be abstracted, which is the only point I have now to decide, and if it is not discharged it will be an incumbrance on the property.

C. A.

From this decision the Plaintiffs appealed. The appeal was heard on the 1st of July, 1881.

Chitty, Q.C., and *B. B. Rogers*, for the Appellants:—

Elford's mortgage is not an incumbrance on the property, and the vendors are not bound to abstract it. Even if *Elford's* title is preferable to that of *Turquand*, the trustee, it will not avail him against us, for there is no question that *Pope's* and *Emmanuel's* mortgages were both before *Elford's*, and we have their title.

But we deny that *Elford* took any interest in the property as against *Turquand*, whose title was under the statute, and there was no need for him to give notice to any one. The Court is bound by the decision in *In re Bright's Settlement* (4). It is true that that case was decided under the 141st section of the Act of 1849, which contained negative words. But the effect of the 22nd section of the *Bankruptcy Act*, 1869, is the same, though it does not contain negative words: *In re Barr's Trusts; In re Atkinson; In re Coombe's Trusts* (5).

(1) 3 Russ. 1.
(2) 4 K. & J. 219. 4 Jur NS 1017
(3) 2 D. M. & G. 140.
(4) 13 Ch. D. 413.
(5) 1 Giff. 91.

It is contended by the Defendant that at all events there is too much doubt about the interest of *Elford* to force the vendor's title upon the purchaser. But when the question relates to the construction of an Act of Parliament, it is the duty of the Court to declare the law, and any doubt which may have previously existed is no reason why the purchaser should not accept the law as the Court decides it: *Alexander* v. *Mills* (1); *Pyrke* v. *Waddingham* (2); *Beioley* v. *Carter* (3).

Davey, Q.C., and *Armitstead*, for the Defendant, were not called on.

LORD SELBORNE, L.C.:—

We do not think it is necessary to hear any argument in favour of the judgment of the Master of the Rolls; and for the purpose of the decision it does not appear to us necessary to say positively and finally that the law is one way or the other on the point argued. There are many cases in which it is necessary and proper to do so, but when you have a question raised upon the construction of a general statute, if there is any reasonable ground for saying that that question is not determined by previous authorities, or that the previous authorities are conflicting, then, in the terms of Lord Justice *Turner's* judgment in *Pyrke* v. *Waddingham*, that cannot be treated as a question of general law so settled as to exclude that kind of question which the Court has paid regard to when it sees there is a doubtful question of title which cannot be forced upon a purchaser. It is not at all necessary to inquire whether the case of *Alexander* v. *Mills* did or did not overrule some previous decisions which might have tended to draw a line as to what was or was not a title to be forced upon a purchaser more strictly than it was drawn in *Alexander* v. *Mills*, but I do not understand that the general doctrine, as laid down by a long series of decisions of Judges of the greatest eminence, and determined before *Pyrke* v. *Waddingham*, and which was explained in *Pyrke* v. *Waddingham*, has been displaced by subsequent authorities. When the Court finds, according to the principles explained in that case, that there is a question open to doubts of the kind there mentioned, and that a title ought not to be forced upon the purchaser, it is neither necessary, nor generally convenient or desirable, that the Court, whatever may be the opinion it has formed upon the question, and on the materials presented in a suit for specific performance, should think that that should conclude all questions as against persons who are not before it. Therefore it is enough to consider whether there are not serious grounds for doubting that the title of *Elford's* mortgage ought to be considered to be a thing in which the purchaser had no concern. There do appear to me to be such serious grounds.

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(1) Law Rep. 6 Ch. 124.

(2) 10 Hare, 1.

(3) Law Rep. 4 Ch. 230.

The first point is this: It is said that, even supposing *Turquand's* title over *Elford's* cannot be proved, nevertheless *Pope's* and *Emmanuel's* are, upon the facts, undoubtedly prior to *Elford's*, and that the Plaintiffs have their title. It seems to me, to say the least of it, that it is a very doubtful and questionable proposition, because if *Pope* and *Emmanuel* had notice of the insolvency when they first acquired their interest, then what is the result of that notice? Then it is said that the whole equitable interest, present and future, until discharged, of *Joseph Guedalla* in the fund in question was vested in the trustee in liquidation. If so, what could they take a mortgage upon? Merely the possibility of there being a surplus which the liquidating debtor might eventually have, and in that state of knowledge their security was only upon the surplus after the whole administration in insolvency. To say that that was a title which could prevail against a person who had got in the whole of the trustee's interest, because there might be another incumbrancer in different circumstances who had a charge which would prevail over the interest of the trustee, is, to say the least of it, a proposition which does not so manifestly commend itself to us as to make it possible for us to affirm it upon this question of specific performance. Without, therefore, deciding what we are not called upon to decide, we hold that there is at least so much doubt in the case that under the circumstances *Pope* and *Emmanuel* must stand in the place of the bankrupt, and not higher, as against anybody whatever, so as to make it necessary for us to say that their title does not make *Elford's* title immaterial.

Then with regard to the question between *Elford* and *Turquand*, if *Elford* has a right the conveyance by *Turquand* is expressly subject to that. If the cases of *In re Barr's Trusts* (1) and *In re Atkinson* (2) were correctly decided, there seems very strong ground for saying that they are applicable here, and if applicable here, then unquestionably *Elford* takes his security without notice of the insolvency, and that would give him priority over *Turquand*. When I say there are certain grounds for thinking those authorities are applicable here, I mean it appears to me that although the words "deemed to be assignable in law" were not in the Insolvent Statute or in the Bankruptcy Act upon which those cases, one in insolvency and the other in bankruptcy, were respectively determined, yet there are words which at first sight seem to go quite as far in saying that the title of the assignee in bankruptcy or in insolvency is to be one upon which he may sue in his own name in the same way as if the original contract had been made with him. We are not called upon to decide that, and we do not decide this question so as to bind absent parties. But we at least think there is a sufficient *primâ facie* reason for holding the decisions *In re Barr's Trusts* and *In re Atkinson* to be good as applicable to a statute conceived in the terms of the 22nd section of the Act of 1869, to make it unfit to force a title inconsistent with that view upon anybody in a suit for specific performance. And with regard to the case of *In re Bright's Settlement* (3), far be it from me even to adopt upon this present occasion the language of the Master of the Rolls, who seems to have thrown some doubt upon that decision. It may have been a perfectly good decision, and if it was, it seems to me to have depended upon the presence of special negative words in the statute of 1849 there construed, which *primâ facie* as to the subject to which they are applied exclude the possibility of the bankrupt giving a title to anybody after his bankruptcy. Those negative words were the ground of the decision. I do not propose to inquire whether they were rightly construed or rightly applied. Those words do not occur in the statute we have to construe, and it has not been proved to my complete satisfaction that they did occur in the statute that

(1) 4 K. & J. 219. 4 Jur N S 1013

(2) 2 D. M. & G. 140.

(3) 13 Ch. D. 413.

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was construed by Lord St. *Leonards* in *In re Atkinson* (1), or in that case tried by Lord *Hatherley* in *In re Barr's Trusts* (2). If they did, then there is some apparent conflict between those decisions. In that state of the authorities, it seems to me that to force this title upon the purchaser would be wrong, and would be impossible.

Therefore the decision of the Master of the Rolls must be affirmed, and the order will be left as it stands, consequently the appeal will be refused with costs.

BAGGALLAY, L.J. :—

I entirely concur.

LUSH, L.J. :—

It may be a matter for very serious consideration hereafter when the question arises with regard to titles, whether the words "deemed to be assignable in law" enlarge the right or only the remedy. At one time the assignee of a *chose in action* could not sue at law. The question is whether the words meant anything more than to give him a right of action at Common Law, so that for the purpose of enabling him to mantain an action, &c., such things were to be deemed to be assignable at law.

Solicitors: *Last & Sons*; *Bourne & Hunt*.

G. I. F. C.
M. W.

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(1) 2 D. M. & G. 140.

(2) 4 K. & J. 219. 4 Jur. N.S. 1013

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In re LEONARD JACQUES.

Practice—Extension of Time to appeal—Rules of Court, 1875, *Order* LVIII., *rr.* 9, 15.

23 Ch D 250

A petition having been presented for payment out of Court of a fund paid in under the *Land Clauses Act* as the purchase-money of a devised estate, the Court, on the 18th of June, made an order declaring the construction of the will and directing inquiries as to the persons interested. An application was made on behalf of some of the parties who were resident in *America* to extend the time for appealing to four weeks from the 8th of July, in order to allow time for the persons acting for them under a power of attorney to consult them as to appealing :—

Held, that, as the order was a final one, the case, though within the letter was not within the spirit of rule 9, the Rules of Court, 1875, Order LVIII., requiring an appeal to be brought within twenty-one days, and that the extension of time ought to be granted.

IN this case a small property devised by the will of *Leonard Jacques* had been taken by the Corporation of *Carlisle* under statutory powers, and the purchase-money (£500) paid into Court pursuant to the *Lands Clauses Consolidation Act*. The tenant for life having died in November, 1880, the fund in Court became divisible among the children of *John Scott* and *Joseph Waugh*. The latter, who were more numerous than the children of *John Scott*, contended for a distribution *per capita*.

Vice-Chancellor *Bacon*, on the 18th of June, 1881, made an order declaring that on the death of the tenant for life the fund became divisible into equal moieties between the issue of *John Scott* and of *Joseph Waugh*, and directing an inquiry who, having regard to the above declaration, were entitled to the fund.

The surviving children of *Joseph Waugh* were resident in the *United States*, and had by a power of attorney dated the 9th of March, 1881, appointed two solicitors in *England* their attorneys to take proceedings for recovering their shares of the fund, but the power was so worded that the attorneys doubted whether it authorized them to present an appeal without consulting their principals.

An application was now made on behalf of the surviving children of *Joseph Waugh* for an extension of four weeks' time from the 9th of July, 1881, to serve notice of appeal from the order of the 18th of June.

Badcock, for the application:—

The fund being a small one, the persons acting under the power of attorney wish to consult their clients before appealing, the power of attorney not expressly authorizing them to appeal. The delay will be but trifling, and in the case of a final order there is no reason for extreme despatch.

Warmington, contrà:—

The Appellants are resident out of the jurisdiction and ought to be ordered to give security for costs.

[JESSEL, M.R.:—They are entitled in any event to half the fund, so you cannot want security for costs.]

The residence of parties out of the jurisdiction cannot be considered a special circumstance warranting the extending the time for appealing.

JESSEL, M.R.:—

The rule requiring an appeal in a matter to be brought within twenty-one days was made because orders in a matter are generally orders which ought speedily to become final, as, for instance, orders in winding-up and bankruptcy. The intention probably was that Order LVIII., rule 9, should apply to orders in winding-up and bankruptcy and other similar matters, though it is not so expressed. The present order, though made in a matter, is really a final order on the construction of a will, and the case, though within the letter of the rule, is not within its spirit. I think, therefore, that as the proposed Appellants are resident in *America*, the extension of time should be granted to give an opportunity of consulting them, but as the application is for a pure indulgence they must pay the costs of it.

BRETT and COTTON, L.JJ., concurred.

Solicitors for both parties: *James, Son, & James.*

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Aug. 3.

OTTO *v.* LINDFORD.

[1880 O. 207.]

Practice—Appeal—Staying Proceedings—Action dismissed—Rules of Court, 1875, *Order* LVIII., *rr.* 16, 17.

24 Ch D 306
308, 310, 1-4

Where an action has been dismissed with costs, an application to stay proceedings for costs pending an appeal must be made in the first instance to the Court below and not to the Court of Appeal.

Wilson v. *Church* (1) explained.

THIS was an action for alleged infringement of a patent, and was dismissed with costs by Vice-Chancellor *Bacon*. The costs had been taxed, and the Taxing Master's certificate obtained. The Plaintiff appealed from the order of dismissal, and his solicitor wrote to the Defendant's solicitor offering to pay the amount of the costs into Court, or to pay them to the Defendant's solicitor on his personal undertaking to refund them if the appeal was successful. To this offer no answer had been returned.

W. N. Lawson, for the Plaintiff, asked for leave to give short notice of motion to restrain the Defendant from enforcing the certificate for costs pending the appeal.

[JESSEL, M.R.:—Have you applied to the Court below?]

No. It is laid down in *Wilson* v. *Church* (1) that where an action has been dismissed the Court below has no jurisdiction to stay proceedings, and the application must be to the Court of Appeal. The case is referred to in *Seton* on Decrees (2) as establishing that rule.

JESSEL, M.R.:—

That was a case of an entirely different description. The plaintiffs there were asking for an injunction to restrain the trustees from parting with the trust funds pending the appeal. That was not an application to stay proceedings under the order appealed from, for that order did not give any directions for deal-

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(1) 11 Ch. D. 576.

(2) Page 1618.

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ing with the funds, and the Court below having dismissed the action, had no jurisdiction to grant such an injunction. In the present case the Plaintiff is seeking a stay of proceedings under the order appealed from, which application the Vice-Chancellor has jurisdiction to entertain, and it ought to be made to him in the first instance.

Cotton L.J.:—

I also was a party to the decision in *Wilson* v. *Church* (1), and I agree with the view taken of it by the Master of the Rolls. I have no doubt that, though an action is dismissed, the Court below can, pending an appeal, stay the doing anything under the order of dismissal, and I agree that the application for that purpose must be made to the Vice-Chancellor.

24 Ch D 311

Brett, L.J., concurred.

Solicitors: *Faithfull & Owen.*

H. C. J.

SINGER MANUFACTURING COMPANY *v.* LOOG.

[1878 S. 148.]

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1879
V.-C. B.
June 25–27;
July 1–4, 8–11,
15–18, 23, 24.
C. A.
1880
Dec. 7, 10, 13,
14.

Trade-Mark—Name of Manufactured Article—Tendency to deceive.

The Plaintiffs, the *Singer Manufacturing Company*, used the word "*Singer*" as a designation of all the sewing machines manufactured by them, accompanied by specific words to distinguish different kinds. The Defendant was the English agent of the *Sewing Machine Manufacturing Company*, a company established in *Berlin*. He sold sewing machines which he described in his invoices, price lists, and circulars as being made on the *Singer* system and the like, with explanations shewing that they were made in *Berlin*. He also put on some machines a label with the words "*Singer* machine," with some additional words referring to the foreign makers. He did not insist on continuing the label, but justified his use of the word "*Singer*" by alleging that it had ceased to designate machines manufactured by the Plaintiffs, and had come to mean machines made upon a certain system, by whomsoever made.

Held, by *Bacon*, V.C., that the Defendant's allegation was disproved, and

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(1) 11 Ch. D. 576.

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that the Plaintiffs were entitled to an injunction both as to the label and the price lists, circulars, and invoices.

Held, by the Court of Appeal, that whether the Defendant's allegation were true or not, the injunction ought to be refused, except as to the label, on the ground that the other documents were not calculated to deceive by representing the Defendant's machines to have been manufactured by the Plaintiffs.

Affirmed by H/L 8 App Cas 15

THE Plaintiffs, a company incorporated by special Act of the Legislature of *New Jersey*, in the *United States*, having a factory in *Glasgow*, and a large business in *London* and the principal towns of *Great Britain*, claimed to restrain the Defendant *Hermann Loog* "from selling or offering for sale as '*Singer* machines' any sewing machine not of the Plaintiffs' manufacture, and from selling and offering for sale in any manner whatever any sewing machine not of the Plaintiffs' manufacture, having branded, impressed, stamped, or painted thereon, or otherwise attached or affixed thereto, the words '*Singer* machine,' or the word '*Singer*,' and from attaching to any sewing machine not of the Plaintiffs' manufacture any plate or label bearing the words '*Singer* machine,' or the word '*Singer*'; and from advertising or invoicing as '*Singer* machines' or '*Singer's* machines' any sewing machine not of the Plaintiffs' manufacture; and from otherwise using the name '*Singer*' as a designation of or in connection with any sewing machine not of the Plaintiffs' manufacture; and from representing in any manner that machines not of the Plaintiffs' manufacture are *Singer* machines; and from representing in any manner machines sold or offered for sale by the Defendant and not of the Plaintiffs' manufacture to be of the Plaintiffs' manufacture."

The Plaintiffs by their statement of claim asserted that the business carried on by them was originally started by *Isaac Merritt Singer*, that they were successors in business to the firm of "*I. M. Singer & Co.*," that the owners of the business had from time to time made and sold a great variety of sewing machines "widely and essentially differing from each other in construction," and that all such machines had been sold by the Plaintiffs and their predecessors in the business as "*Singer*" or "*Singer's* machines;" and then alleged as follows (paragraphs 9, 10):—

"By reason of the sale and advertisement by the Plaintiffs and their predecessors of the various kinds of sewing machines as

Singer or *Singer's* machines, and in fact, all such machines have and have been known and distinguished from others by the name or designation '*Singer*'; and the name or designation '*Singer*' as applied to sewing machines does not and never did signify, and is not and never has been understood in the trade to signify any specific principle of construction or mechanical arrangement of part, or any special type or types of machines, but simply that the machines so named or designated are of the Plaintiffs' manufacture; and the name '*Singer*' as applied to sewing machines has become and is a trade name or designation belonging to the Plaintiffs, signifying and known as signifying machines of the Plaintiffs' manufacture, and no other machines.

"The fact that the well-known *Singer* machines are the manufacture of the Plaintiffs is universally known in the trade and very largely known among ordinary purchasers, and even those purchasers whose attention has not been called to the Plaintiffs' firm, when they ask for a *Singer* machine desire to obtain a machine made by the manufacturers of the machines by which the reputation of the name *Singer* has been acquired, that is to say, by the Plaintiffs."

The Defendant *Loog*, carrying on business at 128, *London Wall*, as the agent for the *Sewing Machine Manufacturing Company* of *Berlin*, sold machines similar in construction to some of the more recent types of machines made and sold by the Plaintiffs. He put on some of those machines a brass label bearing the words "*Singer* machine," with some additional words referring to the foreign makers, and in his price lists and circulars described this class of his machines by such phrases as "our *Singer* system," the "*Singer* treadle machines," and "*Singer* Improved System," and an invoice was proved in which he described the machine sold as "*Singer* Hand-Machine No. 14." By his statement of defence he said that he was willing to abstain from the use of the label, but alleged that "the said name *Singer* signifies and has been for many years and is always understood in the trade to signify and describe a system of construction of sewing machines, presenting particular forms and arrangements of the parts;" that the name "*Singer*" had been applied to machines sold by the Defendant in order to shew that such

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machines were made according to the said system; and that the name was not used by the Defendant to signify, and did not in fact signify, that the said machines were manufactured by the Plaintiffs or by *I. M. Singer* or any of his successors. The Defendant also denied that he was a dealer in sewing machines, and said that he acted as the agent in *England* of "*The Sewing Machine Manufacturing Company*," late "*Frister & Rossmann*," a company incorporated in conformity with the law of *Germany* and *Prussia*.

The Plaintiffs joined issue on the 17th of January, 1879.

The effect both of the Plaintiffs' and of the Defendant's evidence is discussed at length in the judgments.

Kay, Q.C., *Benjamin*, Q.C., *Aston*, Q.C., *Hemming*, Q.C., and *Rigby*, for the Plaintiffs:—

The Plaintiffs have acquired an exclusive property in the name "*Singer*" as applied to sewing machines. It has been used by them to indicate machines of their manufacture, and has been so recognised in the trade. They have never permitted or sanctioned in any way the use of the name by any other person than themselves, and as soon as their rights were assailed by the unauthorized use of the name, they have taken proceedings to protect their property. The name does not, as will be contended by the Defendant, import any specific principle of construction or mechanical arrangement of working parts, or any single type of machine, but simply that the machines are of the Plaintiffs' manufacture; and it has become a trade-mark signifying, and known to signify, machines made by them and none others: *Singer Manufacturing Company* v. *Kimball* (1).

Assuming that the Plaintiffs have this exclusive property in the name, what the Defendant has done in using the name in his circulars, price lists, and advertisements—for he has since action brought offered to submit to an injunction with costs in respect of the placing the name on his machines—is an interference with the Plaintiffs' right calculated to injure them, and such as will entitle them to relief by injunction. A trade-mark is property: *Hall* v. *Barrows* (2); and though in some of the earlier cases there are *dicta* putting the relief on the ground of fraud, it is now settled that the action of the Court must depend upon the right of the Plaintiff and the injury to that right, and that it is not necessary to aver or prove fraud in order to obtain protection for a trade-mark: *Singer Machine Manufacturers* v. *Wilson* (1), which overrules on this point the decision of the Master of the Rolls and the Court of Appeal (2), and follows the earlier decisions of *Millington* v. *Fox* (3) and *Welch* v. *Knott* (4), that a man is not entitled to use the trade-mark of another so as in fact to mislead the public though there may be no intention on his part to mislead, and what has been done has been done innocently. Although it was held (2) that the Defendant in that case might advertise his own machines as "*Singer*" machines, his advertisements always stating that the machines which he sold were manufactured by himself, this ruling was formally reversed by the House of Lords, where it was held (5) that such advertisement was a wrongful invasion of the Plaintiffs' property and would be restrained by injunction, and also that there was no difference between a representation made by advertisements and the same representation made upon the articles themselves (6). In order to justify the use by the Defendant of the name of a rival trader in connection with the articles which he sells, he must shew either that he himself has a right individually to the name, *Burgess* v. *Burgess* (7), or that the article in question is a specific article known by a specific name, and that, as in the case of *Wellington* boots or *Hansom* cabs, he is unable to designate the article in any other way than by its known name: *Wheeler and Wilson Company* v. *Shakespear* (8). The brass label and the price lists, circulars, and invoices shew a clear design by the Defendant to associate the term "*Singer*" with the machines which he sold, and so to appropriate to his goods the reputation which had been acquired by the Plaintiffs' manufacture and business.

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(1) 11 Court of Sess. Cas. 3rd Series, 267.

(2) 4 D. J. & S. 150.

10 Jur NS. 56

Unless, then, the Defendant can displace by his evidence the Plaintiffs' case, that a "*Singer*" machine means a machine manufactured by the *Singer Company*, and that the term has been so recognised in the trade and by the public, the question whether the Defendant has a right to use the word "*Singer*"—on which in the former proceedings the Lord Chancellor has expressed his decided opinion against *Wilson*, who raised the same issue—must be decided in favour of the Plaintiffs.

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(1) 3 App. Cas. 376, 391.
(2) 2 Ch. D. 434.
(3) 3 My. & Cr. 338.
(4) 4 K. & J. 747. 4 Jur NS. 330
(5) 3 App. Cas. 376.
(6) Ibid. 389.
(7) 3 D. M. & G. 896. 17 Jur 292
(8) 39 L. J. (Ch.) 36.

[They also cited *Clark* v. *Freeman* (1); *Ford* v. *Foster* (2); *Maxwell* v. *Hogg* (3).]

Sir *H. Jackson*, Q.C., *Webster*, Q.C., and *Everitt*, for the Defendant (after first calling their witnesses):—

Reliance has been placed by the Plaintiffs upon the proceedings in the House of Lords (4), but nothing was there determined except that the nonsuit which the Master of the Rolls had inflicted upon the Plaintiffs was not correct in point of law, that the Plaintiffs' uncontradicted and unshaken testimony required to be met, and that the case must go back in order that the Defendant's evidence might be taken and the case tried again upon more complete materials. The Plaintiffs have not affixed the word "*Singer*" by itself to their machines, and do not claim it as their entire trade-mark or name. Their trade-name, which has not been registered since the *Trade-Mark Act* came into operation, is "the *Singer Manufacturing Company*," and they are not entitled to pick out any one word of a combination and claim it as their trade-mark: *Cheavin* v. *Walker* (5); *Kelly* v. *Byles* (6); *Sebastian* on Trade-marks (7). The case is reduced to one of mere personation. Do we use the word "*Singer*" so as to induce the public to believe that our machines are the Plaintiffs' machines? Rightly or wrongly, logically or illogically, the trade and the public have given to machines resembling in form and pattern the two machines originally brought into this country by the *Singer Company*, the name of "*Singer*" machines, or machines on the *Singer* principle or system. In cases of personation like this wilful misrepresentation must be established against the Defendant:

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(1) 11 Beav. 112.
(2) Law Rep. 7 Ch. 611.
(3) Ibid. 2 Ch. 307.
(4) 3 App. Cas. 376.
(5) 5 Ch. D. 850.
(6) 13 Ch. D. 682.
(7) Pages 19–21.

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Ainsworth v. *Walmsley* (1). If, as here, the name has become a term of art to designate a well-known process, the Defendant is justified in using it so long as he does not directly or indirectly represent that the article which he sells was manufactured by the Plaintiffs: *Leather Cloth Company* v. *American Leather Cloth Company* (2); *Liebig's Extract of Meat Company* v. *Hanbury* (3); *Linoleum Manufacturing Company* v. *Nairn* (4). So also after the expiration of a patent, when the article has become generally known in commerce under the name of the original manufacturer or patentee, any person has a right to manufacture such article and sell it under that name, but must not lead the public to believe that he is selling as the agent for the original manufacturer: *Wheeler & Wilson Company* v. *Shakespear* (5). Upon the evidence we submit that we have satisfied the requirements of the House of Lords (*per* Lords *Blackburn* and *O'Hagan* (6)), and proved conclusively that our interpretation of the word "*Singer*" is correct. If this case is put upon the question of personation of the Plaintiffs there is not one single scrap of evidence that the Defendant has ever personated the Plaintiffs in any way whatever, or attempted to pass off his goods as being the goods of the Plaintiffs. If it is put upon the right to use the word "*Singer*," "*Singer* principle," and "*Singer* system," the evidence, we submit, has conclusively proved that the word "*Singer*" does, in this country and in the nomenclature of trade, mean a known combination, including both appearance and mechanical parts which the trade and the public recognise under the word "*Singer*"; that the Defendant was in his right when this action began, and is in his right now; and that the action ought to be dismissed with costs.

Kay, in reply.

BACON, V.C.:—

Notwithstanding the enormous length of the evidence and of the arguments which have been adduced, this case seems to me to be a reasonably clear and short one.

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(1) Law Rep. 1 Eq. 518.
(2) 11 H. L. C. 523, 538.
(3) 17 L. T. (N.S.) 298.
(4) 7 Ch. D. 834.
(5) 39 L. J. (Ch.) 36.
(6) 3 App. Cas. 395, 399.

(29SC 11 Jur NS 513.

The Plaintiffs say, "We are the owners of property, the Defendant has injured our property, and we desire that the law should redress that injury." That is the whole case. There is nothing in it but that. The Plaintiffs, the *Sewing Machine Company*, are the successors of a man, who, having become possessed, through a license it is said by Mr. *Howe*, the inventor, of the only thing which has been invented in the whole of this history of sewing machines, the use of the needle and shuttle, proceeded to do that which anybody now is at liberty to do—anybody possessing sufficient mechanical knowledge—to make improvements, to construct a machine, to put a wheel here and crank there, to apply all the resources of the mechanical knowledge that he possessed—wheel, lever, pulley—all the well-known elements, and produced machines which he called "*Singer* machines." At a very large expense, after many years of assiduous labour and diligence, the Plaintiffs' trade has been established. It is proved to be an extensive and a valuable trade, and it is proved, I think conclusively, that it has been carried on under the name of the "*Singer Manufacturing Company*." The Defendant is the agent of some German manufacturers, who, whether attracted or not—it is not for me to say—by the advantages which the Plaintiffs have derived from the trade which they have established through so many years, and by so much labour, brings to this country machines which he calls by the Plaintiffs' name; and the first question to be considered is one of law—whether that ought to be endured by the Plaintiffs, whether they are obliged to submit to that, the injury to him upon the submission being beyond all possibility of dispute. I take it to be very old law—I do not think it is necessary to refer to any modern cases to shew—that a man's trade-mark is his property, and I do not know that his trade-name differs in the character of property from his trade-mark. There was a case, which I have referred to more than once here, as early as the reign of Queen *Elizabeth*. There, in an action of trespass on the case against a man who had adopted the trade-mark of a clothier, it was held he was entitled to recover, and he recovered damages. *Sykes* v. *Sykes* (1) is the only other case which I should find it necessary to refer to, because the judgment there is so clear,

(1) 3 B. & C. 541.

the points were decided so distinctly, that the case settled the law, if there was any doubt about it. I do not think there was any doubt about the law up to that time, and it has never been quarrelled with or questioned since. There a man had stamped as his trade-mark "*Sykes*' Patent" upon shot-belts and powder-flasks. Another chose to imitate that, and put the same stamp upon goods of the same description. A purchaser from the latter knowing well enough that the goods which he bought from the "pirate," if I may call him so for distinction, were not of the manufacture of the Plaintiff in the action, bought them nevertheless, and sold them in the market; and the judgment there was that the Plaintiff was entitled to recover, inasmuch as, although the original purchaser was not deceived, the persons purchasing from him might be deceived; and whether it was the one or the other, that the Plaintiff was entitled to recover, because the Plaintiff's property had been interfered with. It could only be upon that principle. A great deal is said in many cases about fraud. Many of the cases in which the Plaintiff brought his action of trespass were cases in which he could with justice impute fraud to the Defendant; and the *odium spoliatoris* seems too often to have made such an impression upon the Court before whom the case was tried that you find a natural expression of reprobation at the conduct which Defendants under such circumstances have pursued. But who ever heard that a Court of Common Law had any jurisdiction over "moral" fraud, for it is moral fraud which we are talking of now. In an action of trespass on the case the Court has nothing to do with fraud. The Court cannot resist the expression of disapprobation of what the Defendant has done, but it is not the foundation of the judgment. The foundation of the judgment is simply that trespass has been committed, and that the Plaintiff's property has been injured.

Now, here I find it proved beyond all doubt that, up to the year 1870, the Plaintiffs had been in the undisturbed possession and enjoyment of the name and appellation of their machines, and in that year several persons invaded the right. If the Plaintiffs once possessed a property in the name "*Singer*," then I am bound to inquire, and to listen to any argument offered to me on the subject—"how has he lost that property?" because a man may lose any legal right. He may lose it by acquiescence on his part in the practices of another, and cannot afterwards complain of the loss.

The principle of law is well enough known; it is not confined to patent cases or machine cases, but is an universal principle. There is no trace in the case before me—I am speaking now as a matter of evidence—there is no trace of the Plaintiffs ever having willingly, or even negligently, permitted the use by the Defendant or by any other person of their name. From 1870 they have been engaged in frequent litigation. It is in evidence that upon no occasion, whenever the fact of the invasion of their property was brought to their notice, did they omit to remonstrate by their solicitor writing threatening letters. They afterwards brought an action against *Kimball & Morton.* Now, I cannot pass over that without some observations; because, although I admit that the decision of the Scotch Court is no authority in any way binding upon me, yet when I find a plain enunciation of the law by Judges of great repute who are administering a law not differing in any respect from the law of *England*—for the law of *Scotland* does not, in this respect, differ from the law of *England*—and who found their judgment upon the decisions in the English Courts, no reference being made that I recollect to any Scotch case for the foundation of this judgment—I feel very ready to adopt the clear reasoning, the clear, just enunciation of legal principles which I find in that case for the purpose of assisting and guiding me in the decision of the present; but I desire not to be understood as adopting it as an authority.

Well, in 1874, or thereabouts, Mr. *Newton Wilson* was made the Defendant in a suit very similar to that which is brought here—similar in almost all respects, I think, but one. Mr. *Wilson* had put a brass plate upon his machines with a design totally different from any used by the Plaintiffs, and for the express purpose, as he said, of distinguishing his machines from the Plaintiffs'. Not only is that feature wanting in the present case, but the contrary is here plainly proved. The Defendant did put a plate upon his machines, and did sell them; and did by that plate, and by the mode in which he dealt, affirm that he was selling the *Singer* machines. It is not necessary for me to follow the course of the litigation with Mr. *Wilson*. Everybody knows it is in the books of the reports, and it is perfectly well understood now what it was. The Master of the Rolls nonsuited the Plaintiff. The House of Lords, on appeal, thought the nonsuit was wrong. So far there is no doubt or dispute about it. The whole case being before the House of Lords was then gone into with the utmost minuteness, ransacked thoroughly, every principle applicable to it, I believe, was there discussed and considered by the House; and, then and there, the rights of the parties, the state of the pleadings, the real issue between the parties litigant, were stated, dealt with, and, to a certain extent, decided.

8 App/Cas 28

Now it is only necessary to turn to that report to see that all I have said is there placed beyond the possibility of question. The allegations in the bill in the case of the *Singer Manufacturing Company* v. *Wilson* (1) were, if not identical with, so like the present that no substantial distinction can be drawn except as to the charge of the brass plate. At page 384, Lord *Cairns* having gone through those allegations—those of the Plaintiffs—says this: "If these allegations are true, if the term a '*Singer*' or '*Singer's*' machine denotes to the mind of the public, or of those likely to purchase such articles, not a particular type or shape, or arrangement of parts of a machine but a machine the manufacture of a particular person or firm; and if the Defendant, whose name is not '*Singer*,' represents his machines as being '*Singer*' or '*Singer's*' machines, there is at least a case which calls upon the Defendant to shew some reason which would justify him in thus making use of a name which is not his own, but which is the name, and is known to indicate the manufacture of the Plaintiffs." The law as there decided—for so far as I have read it it may be treated as a decision—is open to no question in my judgment. Then the judgment proceeds thus: "The Respondent appears to have felt that it was incumbent upon him to justify his use of the name, and he gives in his answer a statement as to which, if the facts alleged had been established by evidence in the case, the justification might well have been held to be sufficient." I do not desire to read more of this report than is necessary for the present purpose. A great deal of time has been occupied, and I would willingly abridge it. His Lordship then proceeded to state the allegations in the Defendant's defence in the suit, and the defence may be stated in substance to be, that the term "*Singer* machine" had acquired a certain notoriety by being published in the market and elsewhere; that the public were interested in the use that had been made of it in that way; and that he, the Defendant, had the right, as one of the public, to exercise the name and the practice. Lord *Cairns* goes on to examine those allegations. At page 385 he says: "It is perfectly clear that the defence set up in this answer, and the issue tendered by the Defendant is, that the term '*Singer*,' as applied to a sewing machine, has, in the language of the country and the nomenclature of the trade, come to describe a machine or two machines of a particular structure and formation, without any reference to the manufacture or to the quality of manufacture, just as the terms '*Brougham*' and '*Hansom*' cab have come to mean carriages of a particular shape, by whomsoever made, and the object of the Defendant has been to bring the case within the authority of some well-known cases decided in the Court of Chancery, in which it has been held —but always upon the evidence in each case—that a proper name applied to a patented or other article, may come to be the name of the article, and not a mark or sign indicating the manufacturer." Nothing can state more pointedly and distinctly what were the things in issue in the case, and which are the same as those which are now at issue here.

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(1) 3 App. Cas. 376.

Then the Lord Chancellor goes through the evidence, and having done so, at page 388 he says this: "Some attempt was indeed made by the Respondent, to shew in some of the advertisements of the Plaintiffs, and in some of the specifications of patents taken out by or for them, the use of the term '*Singer* machine' or '*Singer* system' in a wider sense; but I cannot look upon any of the expressions so used by the Plaintiffs whilst speaking of their own machines, as doing away to any serious extent with the effect of the evidence to which I have referred. If, therefore, I were obliged to decide this case upon the issue thus raised, and, as it seems to me, properly raised, by the pleadings, and upon the whole of the evidence now before your Lordships upon that issue"—the Defendant's evidence not being there, but his defence being there—"I should certainly feel it impossible to say that the Respondent had established the issue upon which he had placed his case." Then the rest of the judgment deals with the particular circumstances, and there is a passage at page 390 which runs thus: "It is sufficient to say that I think it highly possible that many persons might read the term '*Singer* Family Machine' without looking at the sentence to which I have referred." Then his Lordship referred to the well-known case of *Millington* v. *Fox* (1), which has never been questioned, and, notwithstanding what has been said, in my opinion, is open to no question, where the innocent use of a trade-mark was held to be no excuse for the use of it. Then, as it is stated in the report, the order dismissing the Plaintiffs' bill was discharged, and the matter was sent back to be retried; and it has been stated that there have been no further proceedings in that case for a reason which has been given.

Then Lord *Blackburn,* though he did not altogether agree with some of the things that had been said by the Lord Chancellor, nevertheless agrees in the main, and agrees upon the points which are at issue between the parties. He says, having stated the Plaintiffs' case at page 397, "If these allegations are proved"—that is of the Plaintiffs—"it is clear that the Defendant has done wrong, and that the Plaintiffs are entitled to an injunction to prevent the continuance of the wrong. Whether they would be entitled to an injunction to the extent which is asked for . . . is a different question." Then, having stated the answer of the Defendant, at p. 399 he says: "My Lords, these allegations, if proved to the extent here alleged, would clearly establish that the Defendant had not done anything wrong. A great deal of evidence was produced by the Plaintiffs, all of which is before your Lordships. A great deal of evidence was also offered by the Defendant. But the course taken in the Court below has been such that your Lordships do not know what that evidence was. For the Master of the Rolls, having heard and considered all the evidence produced on behalf of the Plaintiffs, thought that they had not proved any case for relief; and that being so, he considered it a mere waste of time to hear the Defendant's evidence; and consequently he decided against

(1) 3 My. & Cr. 338.

the Plaintiffs on their own case, and their own case only, without reading the affidavits in answer, and without giving the Defendant an opportunity to call *vivâ voce* evidence. The evidence tendered on behalf of the Defendant has not been brought before your Lordships, and his *vivâ voce* evidence has never been given at all." He proceeds to say: "The Lords Justices (*James*, *Mellish*, and *Baggallay*) all took the same view as the Master of the Rolls. If your Lordships, as a Court of Appeal, took the same unhesitating view as to the failure of the Plaintiffs' case as made out on their evidence, there would have been no inconvenience arising from not having the Defendant's evidence before you. But I think there is evidence on the Plaintiffs' case such that, if given in an action at law to recover damages, the Judge would be bound to leave it to the jury to say whether the Defendant did try to sell his own goods as and for the Plaintiffs'. If he did do so I think the Judge would be bound to direct the jury that it was a fraud so to do, and that a cause of action had arisen."

Now, I have read so much of the case, because it, in my opinion, narrows the subject in dispute, and I have now only to consider—performing the functions of a jury, having said what I have to say on the law of the case, and agreeing entirely in the law as it is decided in the case referred to—I have only to say whether the defence, or what was alleged to be the defence, by Mr. *Wilson* in his case could be established; and whether what is alleged by the Defendants in this case, being exactly the same, is established to my satisfaction; and if I were a jury, or upon a jury, I should not hesitate in coming to a conclusion. For the evidence is this: a large number of witnesses—uninterested persons, for anything that I can know or can see, skilled in the subject on which they have given evidence, versed in the trade to which these machines belong, have given repeated, distinct evidence that there is no such thing as Mr. *Wilson* alleged in his answer, and as this Defendant also alleges, and has insisted upon—no such thing as a general name, a thing known to the trade, or in the language of the country, or in the nomenclature of the trade. There is no such thing in existence. The Defendant adduces witnesses no doubt who say to some extent and in some degree the contrary. If I were only to number them, and not to weigh them, the Plaintiffs' evidence would very far outbalance that of the Defendants; but it is proper to consider who are these witnesses adduced by the Defendant. Many of them belong to an association—not an unlawful association for anything I know. Many questions were put by counsel in the course of the examination for the purpose of seeing what it was. One witness said it was a "Board of Trade"; another said it was a "Trade Council," and that it was established for the purpose of protecting trade rights, and it is clear that several of them have contributed their money, and that the association have contributed their money to reimburse Mr. *Wilson* some of the expense he had been put to—I do not say that that disqualifies them, but I do say it makes it incumbent upon me to examine with the greatest closeness the evidence they have given; and when I find that they are one and all banded together for the purpose of defeating the Plaintiffs' claim, that they have every inclination and desire to do so, it is still more incumbent on me to see what it is they have said. There is not one of them who has ever said that at any time before the year 1870, since which date these spurious "*Singer*" machines have been made and sold over and over again—he claimed, or announced to the public, or asserted, that he was, according to the nomenclature of the trade or the common use of the English language, the maker of a "*Singer*" machine, or that he made or sold a "*Singer*" machine. The defence in that respect, in my opinion, wholly breaks down.

I could occupy a long time if it were thought to be proper in going through this evidence. I do not think so. It has been commented on at great length by the Defendant's counsel, commented on at equal length at least by the Plaintiffs' counsel; I have listened to it through many long days, and have it perfectly present to my mind, as much as a jury could have if a jury were to try this case; and I say that the Plaintiff has established his case, and has utterly negatived that which the House of Lords said the Defendant *Wilson* had a right to prove, and which if he did prove, it would form a justification for that which was complained of against him in that case. I say that is plainly disproved.

Well, then, it is not necessary to go into other things which have been discussed at great length about "principle" and "system." There is no common principle except the needle and shuttle. Nobody can say there is anything like an approach to any principle. Two learned gentlemen—experts—have been examined on the subject, most unprofitably in my opinion. There is no principle. There is a principle of needle and shuttle which everybody can understand; but after that, there is no more principle than there is in a watch, in the lever, spring, pulley, or anything; whatever varieties may have been introduced—and it is in evidence that a great many varieties were introduced by the Plaintiff, so great as that the first "*Singer*" machine he made is no longer in use in the first set of "*Singer*" machines—no longer in use—and perhaps hardly in existence.

Well, but then, whether this was calculated to deceive or not is not a question for me to go too deeply into. If the Plaintiffs are injured the motive does not signify. The persons engaged here are the Plaintiffs, whose property is invaded, and the Defendant, who insists he has a right to make use of the Plaintiffs' property, which he is not justified in doing.

There is another thing to be considered, and that is the use of this brass plate. I have not heard a word in justification, I have not heard a word of reason why it was put on. If the intention of the Defendant was fair, just, and honest, why did he put a brass plate with the word "*Singer* machine" upon it? I have not heard a word of excuse offered for that. Indeed, the pleadings did not render it necessary that I should hear a word, because the Defendant's answer contains a most unqualified submission. Being detected in this he says: "I have a right to defend myself against all the rest of the case, but as to this I confess I was in the wrong." Then the Plaintiffs did not want to leave it there, but having Mr. *Loog* to examine, their counsel asked Mr. *Loog* how many of these plates he had put on, and when he had put them on. He had a right to inquire into that. What sort of answer did he get? Mr. *Loog* could not tell—his books might tell. He brings his clerk the next day who has looked at the books, and he cannot tell how many he had in the first instance; how many he has used; how many he has sent back to *Germany*. All these matters are to be considered where I am obliged, as I am to some extent obliged, to consider the honesty of a case.

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Then, when the trade circulars and the lists are shewn there is a most evident, palpable, adoption of the Plaintiffs' name, the "*Singer*" machine; and I do not think that is at all mended or cured by the way in which the Defendant describes his own goods, by printing "*Wheeler & Wilson*" and "*Singer*" in the largest type that he uses; and then in others, "*Sewing Machine Manufacturing Company,*" which is as closely an imitation of the Plaintiffs' firm, bill, or appellation as can be conceived; and I find he goes on, knowing well enough that the Plaintiffs had the rights which they insist upon—he talks about the so-called original "*Singer* machine," and "our *Singer* machine;" and then he says, "Preference is given sometimes to '*Wheeler & Wilson,*' and in others '*Singer's*' only are in favour." Then he concludes by saying, "Our '*Singer*' machines are made with a loose wheel arrangement. We also supply with every '*Singer*' treadle machine every appliance by which it can be converted into a hand machine." However the submission is unqualified, and to that extent the Plaintiffs are entitled to relief.

In my opinion the Plaintiffs are entitled to an injunction which will protect them in the enjoyment of the property which has been theirs all these years, against which, neither by their negligence nor acquiescence, has any other person acquired a title, nor is there any evidence that anybody has ever asserted a title.

I did not observe upon the French Exhibition, which, in my opinion, has nothing in the world to do with it. What Mr. *Callebout* did in *France* can have no kind of influence upon the questions here at issue; and although I forgot to mention it as I was passing, I would not have it supposed that I had left it out of my consideration. Nor, indeed, during the seventeen days this case has lasted, have I failed to pay all the attention in my power to the evidence on either side, and I have stated now the result to which, if this were before a jury and I was upon the jury, or the jury, I should not fail to come as a matter of evidence. The defence that the machine has acquired a name in the trade which entitles any man to make use of the name wholly fails, even upon the Defendant's evidence. The contrary is plainly established by many witnesses on the part of the Plaintiffs; and I am of opinion, therefore, that the Plaintiffs are entitled to an injunction to restrain the Defendant from selling or offering for sale as "*Singer*" machines any sewing machine not of the Plaintiffs' manufacture.

The injunction will be in the terms of the relief claimed; there will be an account of profits; and the Plaintiffs will have the costs of the suit.

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From this decree, except so far as it restrained him from affixing the plates and labels to his machines, the Defendant appealed. The appeal came on to be heard on the 7th of December, 1880. The arguments were the same as in the Court below.

Sir *H. Jackson*, Q.C., *Webster*, Q.C., and *Everitt*, for the Appellant.

Kay, Q.C., *Aston*, Q.C., *Benjamin*, Q.C., *Hemming*, Q.C., and *Rigby*, for the Plaintiffs.

JAMES, L.J.:—

This case appears to me, after many days spent in reading evidence, to be a very short and very simple one. Upon the question of law which is involved, there is, to my mind, no dispute whatever. I have often endeavoured to express what I am going to express now (and probably I have said it in the same words, because it is very difficult to find other words in which to express it)—that is, that no man is entitled to represent his goods as being the goods of another man; and no man is permitted to use any mark, sign or symbol, device or other means, whereby, without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate customer. That being, as it appears to me, a comprehensive statement of what the law is upon the question of trade-mark or trade designation, I am of opinion that there is no such thing as a monopoly or a property in the nature of a copyright, or in the nature of a patent, in the use of any name. Whatever name is used to designate goods, anybody may use that name to designate goods; always subject to this, that he must not, as I said, make directly, or through the medium of another person, a false representation that his goods are the goods of another person. That I take to be the law. Now, applying that law to the facts of this case, I am of opinion that the label which the Defendant was, as I conceive, very well advised to discontinue the use of, and to submit to be enjoined from using in future, was calculated to deceive, and was calculated to make a false representation as between somebody who did not know who the real manufacturer was and his vendor, and that upon many grounds. The label was of the same shape, of the same metal, of the same colour, placed in exactly the same position in which the Plaintiff company's label was put, and it did contain the word "*Singer*," no doubt, with other words annexed to it, but which might very easily have been overlooked; and, therefore, in my opinion, it comes entirely within those cases in which it is calculated, and, if calculated, must be assumed to have been intended, to make a false representation. But when I come to the other documents, I am really unable, after all I have heard, to see anything which could deceive any human being. First of all, it is said we must look at it, not as if we were looking at it ourselves, but must consider that these things, to some extent at all events, and in the ultimate result, might get into the hands and be the means, or be made the means, of deceiving tailors and seamstresses and people of that kind, who are supposed to be peculiarly liable to be unwary and easily taken in in such a matter as this. Now, I cannot agree quite in that. In a matter of their own trade, in buying their own trade tools or trade machines, that class of persons are, in my opinion, as sharp, as acute, and as suspicious as anybody; and I am disposed to think that they would be so anxious to get the real article which they wished to buy, that they would have their intellects sharpened to a considerable extent, so that they would be quite as ready to detect any sign of spuriousness in the machines offered to them as a bank clerk, who has been in the habit of dealing with such matters, would be to detect whether a sovereign was bad or not, or whether a bank-note was a forgery. Whatever be the class of persons who buy these things, we must at all events assume that they are persons capable of reading and writing, or capable of reading at all events. How does it stand, to begin with? Mr. *Loog* has an office or counting-house at

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128 *London Wall*. It does not appear, and there is nothing in the evidence to shew, that the shop has anything in its external appearance which would induce people to go there to buy the machines of the Plaintiff company. The Defendant is the wholesale agent of manufacturers, and by using the circular complained of he invites the public to come and deal with him. The circular says where he is, what he is, and what it is he is offering to the public. He says this in very large type, and with a picture of the place of his manufactory: "The improved *Wheeler-Wilson* and *Singer* systems, manufactured by the *Sewing Machine Manufacturing Company*, late *Frister & Rossman, Berlin*." Well, stopping there, how is it possible for anybody who can read to suppose that a man who is offering machines on the improved *Wheeler-Wilson* or the *Singer* systems, "manufactured by the *Sewing Machine Manufacturing Company*, late *Frister & Rossman, Berlin*," was offering anything of the Plaintiffs? Is it possible that a man, buying under this circular, would really be induced to buy a thing supposing it to be made by the Plaintiffs? Then the circular goes on in the plainest terms to say: "We are competing with them; we know they are good; but we are better." It boasts that their manufactory "is the only manufactory in *Germany* where sewing machines on the *Wheeler-Wilson* and on the *Singer* system are produced on a really large scale. With the aid of the most complete and costly machinery, and all the newest improvements, every part of the machine is turned out in a style not to be surpassed." Then, after a little, they say: "Our two systems, namely, *Wheeler-Wilson* and *Singer*, are those which are mostly in demand; they both answer the same purposes, and it would be difficult to establish a difference of their respective values, and yet we find one prefers this system, one the other; indeed, we find that the preferential difference extends to whole districts, for while in some towns we can only sell *Wheeler-Wilsons*, in others *Singers* only are in favour; and thus it seems almost natural that every buyer gives preference to that system which happens to be particularly recommended to him. We, as manufacturers, can recommend both with equal confidence, and we can confidently assert that all fabrics, from the finest muslin to the very thickest cloth, will be worked with perfection on all our machines. We

also refer to our instruction book given with every machine, by means of which everyone can do any kind of work without other assistance. We may still mention that our machines are all of one standard quality, and the difference in price only refers to more or less ornamental work," &c. Nobody who reads that, and is capable of entertaining any idea at all, whether a tailor or a seamstress, or any other person, could have the slightest doubt that the German company were manufacturing in competition with the Plaintiffs. This circular, as I understand, is the thing by which the world and the public are invited to come to the counting-house of Mr. *Loog*. Well, anybody who comes to him, knowing him to be the agent for the manufacturing company at *Berlin*, receives from him, apparently upon request, as far as we know, a price-list of the machines which they are selling. They receive this price-list, which sets out that it is the price-list of the *Sewing Machine Manufacturing Company* (late *Frister & Rossman Limited*, 128 *London Wall*, *London*, E.C.), and is marked "private." That would be a private list in order that the ultimate customers should not see it. The meaning of the price-list is that those are the prices to their own customers, the dealers, not to be shewn to all the world, because their customers would not like the ultimate customer to know the price they were paying for the machines. This is the private wholesale price-list, not intended to be communicated to the whole world. It is supplied to those who apply to them as wholesale dealers, and who are going to sell them again. It speaks of the "*Wheeler-Wilson* Improved System" and "*Singer* Improved System." Well, what is there in that from which anybody could suppose (unless the word "*Singer*" is supposed to be enough to do it) that he was getting the article of the *Singer Manufacturing Company?* I protest I am unable to see how anybody could be deceived by this circular being put into their hands. The first person, beyond all question, could not be deceived. How could this enable anybody in the world to represent to a subsequent purchaser, "You want to have machines from the manufactory which has hitherto supplied you; now this shews you that we have got it"? It is a very idle and far-fetched supposition. What is the meaning of "*Singer* Improved System?" It is said that expression could not be honestly put in, because there is no such thing as a "*Singer* Improved System;" that the words could only be put in to introduce the word "*Singer*;" that it is mere colour; and that the word "*Singer*" was put in to produce the impression that what was meant was the manufactured article of the Plaintiffs. The expressions, "*Wheeler-Wilson* Improved System," and "*Singer* Improved System," to my mind, have a very intelligible meaning; whether you call it a "system" or whether you call it a "principle," it has a very intelligible meaning. We have the machines all here. They are "*Singer*" machines, which are to have certain qualities and certain names. Each one has some difference, but they are all on the same principle, part of the same system. They constitute the "*Singer* Improved System," and the man says, "I use the same system, and I have got the same machines exactly, in point of arrangement and construction and form." That disposes, to my mind, of that document. The next document is the invoice, about which so much has been said. The invoice is only given to a person who has first of all come in and bought an article; the invoice could be no false representation to a person who has bought something, and who is merely having a memorandum of his purchase. It is headed with a picture of a manufactory and three addresses, *Paris*, *Brussels*, and 128 *London Wall*, and above that "*Hermann Loog*, on account of the *Sewing Machine Manufacturing Company*, late *Frister & Rossman, Limited*." Then one of the machines described is called "The *Singer* Treadle Machine," which is not the name of any one of the Plaintiffs' machines, for I do not think they use the term "Treadle" for any of theirs. It is called the "*Singer* Treadle Machine," that is to say, as between them, that is what it was. They do not say in so many words, "Our *Singer* Treadle Machine," &c., "One of our Treadle *Singer* Machines," or "*Frister and Rossman's* Treadle *Singer* Machines," but that is not necessary, because both parties would know exactly what they were dealing with. But it is suggested that this document would be or might be used to enable a dealer who has bought machines and got such an invoice, to say, "Now this is a machine which I bought from this company, this is the invoice which I got with the machine; and look here, do you not see in this invoice it is called the '*Singer* Treadle Machine'?

Can you doubt that it is one of the '*Singers*' that you want to get, that this is one of the machines of the *Singer Manufacturing Company?*" That, to my mind, is far too remote a suggestion. Of course, if a man is minded to tell lies he can tell them without being assisted. This invoice is not the sort of document which ever would be shewn by a man who is retailing machines and charging £3 or £4 for what by shewing the document it would appear that he only gave £2 or £3 for. On the contrary, it is intended to be kept as private as the price-list, and would in the ordinary course of business be kept as private and as confidential as the price-list between the first vendor and the second vendor. A great quantity of the evidence on both sides went to one issue, as to whether there was such a thing as a "*Singer* principle" or "*Singer* system," whether the name "*Singer*" did originally indicate the manufactory or indicate the particular kind of thing. A great deal of evidence went to shew that of late years it has grown into being the name of the thing, and that was so through a series of wrongful acts of different persons. But that issue, as to what extent the word "*Singer*" may or may not be used, does not seem to me to arise in the present case between the *Singer Manufacturing Company* and Mr. *Loog*, and therefore I decline to enter into that part of the case, or to intimate any opinion on that question. I am of opinion, therefore, that this case wholly fails; and there is no evidence whatever, except as regards the label, that the Defendant has done anything which either in itself directly, or in the ultimate result indirectly, would make that false representation which is the foundation of this kind of action.

COTTON, L.J.:—

The question we have to consider in the present case is this, whether the Defendant has represented that the goods manufactured by him were manufactured by the Plaintiffs, or whether he has done anything calculated so to represent. I quite agree that it is unnecessary that a fraudulent intention in issuing the circulars complained of should be established. If the natural consequences of those things, even in circumstances not known to him, is that they will represent the goods to be those of another person, it is wrongful, and, as this Court says, a fraud in him to continue the user after those circumstances are brought to his knowledge. We must consider whether he has represented, or done that which is reasonably calculated to give that misrepresentation, and we must consider what is relied upon. First, I will put out of the question a great deal of argument, which occupied the greater part of the time of the Court below. The Plaintiffs desired to get a judgment in this case from the Court here, and possibly from the House of Lords, as to whether or no the name "*Singer*" could be held *simpliciter* and by itself to describe machines not made by them; whether, in fact, "*Singer*" was to be taken to mean "as made by the *Singer Manufacturing Company*," or to mean "made by the *Singer Manufacturing Company*." Although, in one of the matters complained of in this case as having been done by the Defendant, there is the expression "*Singer*," which I will deal with presently, in my opinion that is not an issue which arises here, because I do not find in the acts complained of as being done by the Defendant, with the exception of the label, that he does call his goods "*Singers*." Therefore, in my opinion, we are not called upon to express an opinion whether "*Singer*" has now arrived at the secondary meaning, "as made by the *Singer Manufacturing Company*," or whether it still bears the meaning of "made by" that company. But in every case it must depend upon the context whether the word is to be read as, in fact, "made by" or "as made by"; and therefore it is almost impossible to lay down any general proposition as to the right to use that name which might not be calculated to mislead in some other case which may arise. I will only say this: the label is out of the question, because the Defendant has conceded, and I think rightly conceded, that he is not justified in using that label. That concession has been attempted to be used by the Plaintiffs as an admission of their right in all things. Whether the Defendant was right or wrong in using the label, I consider is of no importance; but, even if it was wrong to use the word "*Singer*" as he did on that label, that would in no way, in my opinion, decide that he might not use even the same words that he there used on a document such as a circular, or bill, if he had done so. Why? I perfectly agree that, if there are words which in terms misstate and misrepresent the manufacture of the goods, it is immaterial whether that is found on a label or on a circular, or on anything else; but where the words are not in terms a misstatement, the effect and meaning of the terms may be very different when they are found on a label on the machine, and when they are found in a circular; because, if we find that the label is like that of a rival manufacturer, and is on the place on the machine where he indicates by whom the machine is made, the use of ambiguous words, if capable of being construed to mean that the machine was made by somebody who was not the maker, when put in that place may well be taken, and naturally would be taken, to represent that they were a description of the maker, and not a mere description of the machine, or the kind of machine. I pass that by, putting it aside for the present, although I will refer to it by-and-by for another purpose. The admission of the Defendant that he could not defend the use of that label with the word "*Singer*" upon it ought not, in my opinion, to be treated as an admission that he was wrong in other things. Then what are the things relied upon? They are these, and I will take them in what I think is their natural order. We have the circular; we have the price-list, and we have the billheads. I will consider them separately, although, as far as I can see, that is not really the burden which the Defendant has to bear; because one can see that the circular is sent round to those with whom he is dealing. When they offer to deal with him they send the price-list, and when they have dealt with him they send the bill. When we have to deal separately with the subsidiary use which might be made by the purchasers from him, when they get these documents, we must remember this—that here we have a wholesale dealer; that is to say, as I understand, one who, although selling single machines, would sell only to those in the trade, or to such as came to him in that character. That gets rid of a great deal of the argument, at least for the present purpose, as to the use of this circular, and the argument about the ignorant seamstress who might see this document. But all that we find in these documents is a representation—and that was the most relied upon—that the improved "*Wheeler-Wilson*" and "*Singer* systems" are manufactured by these persons, the "*Sewing Machine Manufac-*

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turing Company." It can hardly be suggested that that was an imitation of the name of the "*Singer Manufacturing Company.*" But there is no statement whatever in terms that the machines are "*Singer* machines," except in combination with other words, which shew that they are "our *Singer* machines," or "*Singer* machines," competing with the original "*Singer*" machines. But it was said, and that was very much urged upon us, that "*Singer* system" was in fact a statement that these were "*Singer*" machines without any qualification—that is, machines made by the *Singer Manufacturing Company.* Is that a reasonable interpretation of the words? In the first place we have this—we have the *Wheeler-Wilson* and the *Singer* systems. A great deal of the argument addressed to us was that the "*Singer* system" meant nothing, and that a "system" meant nothing, and that "*Singer*" must be put there in order to represent that the machines which were offered for sale were made by the *Singer Manufacturing Company.* But, could it be contended that there were not two systems (whether that is the most accurate word or not is another question) represented on the one hand by the "*Wheeler-Wilson,*" and on the other by the "*Singer*"? Even the witnesses for the Plaintiffs pointed out the differences of construction between the "*Wheeler-Wilson*" and the "*Singer,*" that is to say, the machines made by *Wheeler-Wilson* and the machines made by the *Singer Manufacturing Company.* We find also, through a series of years, words used such as these:—In 1865, in a specification, "the well-known arrangement of the '*Singer*' machines;" in 1866, "the ordinary "*Singer*" machines;" and then, in 1872, "the class of machines called '*Wheeler-Wilson*' and '*Singer*';" and then, I think, in a catalogue in the year 1875, we find what is known as the "*Singer* sewing machine." Then there is something more. It is said, and perfectly truly, that the case stands differently—that is to say, more favourably to the Plaintiffs—than it would have done if they had had for years this machine in its entirety protected by letters patent. There were no letters patent which so protected it. That must, I think, be taken as proved; but we do find that the Plaintiffs, on several occasions, assumed to interfere with persons who were selling machines made like theirs, because they said, "You are violating our letters patent," and that was to some extent acquiesced in, and in other cases it was contested, and the patents were, so to speak, broken down. Taking all these things together, can we say that the reference to "*Singer* system" is so absurd as to induce us to come to the conclusion that "*Singer*" is here introduced in combination with "system," not for the purpose of pointing out a particular construction or manufacture, or configuration of machines, but for something else? The result, in my opinion, is that we cannot properly come to the conclusion that "*Singer* system" was intended as a device to represent the thing as "*Singer* machines made by the *Singer Company*," under the guise of speaking of something which did not exist, viz., the "*Singer* system." I say it is impossible to suppose that any purchaser from the Defendants—a wholesale purchaser—could be deceived by the representations which are contained in that circular. If that was put into the hands of any other worker, male or female, in my opinion, they would see nothing which could mislead them or be construed by them as a representation that those were "*Singer* machines" made by the *Singer Company*, and not machines made in accordance with the system adopted by the company—that is, upon the system of construction, or whatever it may be, which was adopted by the company. Then we have the price-list. It is said that was sent broadcast about, and that it is misleading. I cannot see how a price-list speaking of "*Wheeler-Wilson* Improved System" and "*Singer* Improved System" can be a statement that those machines were "*Singer*" machines in the sense of being made by the *Singer Company*. And here one must observe, as possibly I ought to have observed before, with reference to that, that it has been conceded, and must be conceded, that it was within the perfect right of the Defendant to gain this benefit from the credit and advertisements of the *Singer Company*, and that he might say (if he did not say so in a way calculated to mislead), "I make machines exactly the same as those which are made by the *Singer Company*, and they are as good, or better, than the machines manufactured by the *Singer Company*." That he would have a perfect right to do; and although, no doubt, by doing so he would gain a benefit from the credit and advertisements of the *Singer*

Company, and from the course which they have adopted, he would be doing nothing which the Plaintiffs could complain of as wrongful, for he has a right to state that, although not to state that his machines are made by somebody else. Now, we have another document, and that is one which I agree is most favourable to the Plaintiffs. It is the invoice, and, I must say, it is the only document which gave me any doubt about the conduct of the Defendant. This invoice describes the "*Singer* Hand Machine No. 14" as the property sold. Of course that could not be deceptive to the person who bought from the Defendant; but it was urged (and that was the point on which I really doubted during the course of the argument) that it might be used as an instrument of deception by the purchasers from the Defendant when they were selling again. In my opinion, if a man does that, the natural consequence of which (although it does not deceive the person with whom he deals, and is therefore no misrepresentation to him) is to enable that other person to deceive and pass off his goods as somebody else's, for that he is answerable. But this is confined to those things which in their necessary or natural uses accompany the things sold. For instance, the corks of champagne bottles marked "*Moet and Chandon*" must be in the bottles sold, and must accompany the bottles. They must necessarily accompany the thing to the retail buyer, and so must labels to be put on the bottles. The very reason for their existence is that they must be put on the bottles, and, if they are deceptive and fraudulent, then the person who prepares them is answerable for it. Such things must not be used if their natural and legitimate consequence is, not to deceive the person to whom they are sold, but to enable the seller to pass off the goods as being the goods of other persons. But here, in my opinion, that is not the natural or necessary consequence of the documents complained of. Here it is an invoice accompanying goods sold, and we must take it that the natural consequence was that it would not be shewn to the retail purchasers. We have no evidence that this could, according to the ordinary course of dealing, be naturally or probably so used as to deceive. That being so, we have no representations made, or anything done which naturally makes a representation to the buyers from the Defendant, that the goods that the Defendant sold were manufactured by the Plaintiff company, and, in my opinion, therefore, except as regards the label as to which the Defendant has submitted, the case fails. I will say one word upon that label. It was urged that, having regard to the admittedly wrongful user of that label, we ought to hold that everything else that was done was done *malo animo*, and was fraudulent. In my opinion that would be wrong. I should be prepared to hold that that label could not be used; but, in my opinion, it would be wrong to give to these documents, and to the representations contained in them, a construction which they do not justly and naturally bear, simply because at the time the Defendant was issuing these documents he had done something else which, as against the Plaintiffs, was wrongful. We cannot, in my opinion, construe these documents, in the absence of all evidence of any fraudulent intent or user of the documents themselves, by the reflected light of the use of the label. There is one other matter which I must mention before I conclude. I think, if it had not been for the case in the House of Lords of the *Singer Machine Manufacturers* v. *Wilson* (1), this case would probably hardly have taken the time which it has done. There are two ways in which that case was urged upon us, but the decision, in my opinion, has no bearing on this case. No doubt, in moving that the matter should go back for a new trial, the Lord Chancellor did intimate an opinion that a *primâ facie* case had been made out by the Plaintiffs to be answered. Some of the other Lords (Lord *Blackburn*, I think, for one) rather differed from him. No new law was laid down in that case. All that is said there is that fraud in the act done was not material if it was calculated to deceive, and I think the Lord Chancellor (Lord *Cairns*) said something in moving the judgment of the House very like what I have said, that if the natural consequence of the course of dealing which is complained of is to deceive, it becomes a wrong and a fraud if, after notice of those facts, a man continues and insists on going on with that course of dealing. But no new law whatever, so far as I understand, was laid down by the House of Lords in that case. That being so, we ought not, in my opinion (and I say it with the greatest respect for the House of

(1) 3 App. Cas. 376.

Lords), to be influenced in arriving at a decision on the question of fact in this case, because they, upon the evidence there, and the documents there, arrived at a conclusion in favour of the Plaintiffs. The statement was a different one, and it was "*Singer* machine" *simpliciter*, and the person who was using that was not a wholesale dealer only, but he was a retail dealer, and it was with reference to that that a good many of the observations of the Lord Chancellor were addressed. There is nothing, in my opinion, in that case, or in the speeches made by the noble and learned Lords, which is in any way inconsistent or at variance with the decision at which we have now arrived. If there had been, I should of course have bowed, whatever my own opinion was, to the decision of the House of Lords. The decision, in my opinion, of the Vice-Chancellor, except as regards the label, cannot be supported.

LUSH, L.J.:—

I am of the same opinion. The question before us is a very simple one, and it ought to have taken a much shorter time than it has. It has been so overladen and obscured by a mass of evidence, and by a line of argument entirely beside the mark, that it has required more than an ordinary effort to keep before the mind what the simple question is. We are not dealing with the validity of a patent. The Plaintiffs, the *Singer Manufacturing Company*, have no monopoly in the manufacture of sewing machines; the patents which they had expired some years ago, and it is now open to all the world to make the identical machines which they make, and to imitate theirs in every particular. Nor have they any right of property in the name "*Singer*" in the sense in which they seek to use it, namely, in the sense that they can restrain every competitor from using the word "*Singer*" as descriptive of the kind of machine, however he may qualify or explain it. There is no such thing, to my mind, as a property in a word in that sense. What they have a right to require is that which is common to every manufacturer of goods, namely, that no competitor shall be at liberty to attempt to put off goods of his own manufacture as being goods of the manufacture of another. That is the right which they have and no other; and the question here is (as has been stated by each of my learned brethren), has the

Defendant, in his mode of carrying on his business, represented in any way to those who buy his machines that they are buying the machines which are the manufacture of the *Singer Manufacturing Company?* If he has, then he is guilty of a fraud towards the buyer, because upon that supposition he has misled the buyer, and he has, at the same time, been guilty of a fraud towards the *Singer Manufacturing Company*, because upon the same hypothesis he has deprived them of a customer; but if he has not, it does not signify that he has sold identically the same machine, or that he has put a name upon them which is the same name they use, if he takes care that he does not so use that name or word as to convey to the buyer the meaning that they have been manufactured by that other company. Now I put aside, as altogether now out of the case, the metal mark which the Defendant once put upon these machines, not, I believe, upon all of them, but upon some of them. It very much resembles in shape, in colour, and in the position in which he placed it on the machines, the trade-mark of the *Singer Manufacturing Company*. If that had been continued I think there would have been a fair cause of complaint on the part of the company; because persons might easily be misled by the look of that piece of metal into supposing that they were buying the *Singer Manufacturing Company's* machine. But at an early stage of this suit the Defendant surrendered and abandoned that, and undertook never to use it again. But the company was not content with that. They went on to endeavour to prevent his using the word "*Singer*" in any sense whatever in connection with his sewing machines, and that is the question which we have now before us. As I have said, the question is not whether he used the word "*Singer*," but whether in using that word as he did he represented, or led the buyers to understand as reasonable persons, that they were buying a machine which had been manufactured by the *Singer Company*. I can see no evidence whatever, apart from that piece of metal, which I treat as abandoned, of any intention on the part of the Defendant to do that, or in any paper that he issued anything calculated to lead the buyer to suppose he was buying the machine manufactured by the company. The handbills say expressly that the machines are made by the German house, and that they are made upon certain systems. They make both what are called the "*Wheeler-Wilson* system" and the "*Singer* system," which clearly tells those who buy from them that they are not buying machines made by *Singer*, but buying machines made like the "*Singer*." His price-list makes the same distinction, and whenever he sells the machine he delivers with it this pamphlet entitled "Directions for the use of *Frister & Rossman's* Shuttle Machine on *Singer's* Improved System." How can that possibly mislead any person into the supposition that he is buying any machine actually made by the *Singer Company?* It expressly states that the machines are made by *Frister & Rossman.* That was the name of the German house which has since become incorporated in *Germany*, and is now called the "*Sewing Machine Manufacturing Company*." That is the name which the subsequent lists and directions bear. The name of the Plaintiff company is the "*Singer Manufacturing Company*." This name of the Defendant's company is entirely different, and, moreover, it is always stated as being a German company situate at *Berlin.* I take the price-list because he sells only wholesale, and the buyer knows at once that he is purchasing machines constructed, it is true, upon the "*Wheeler-Wilson*" and the "*Singer*" systems, but actually manufactured by the German company. The invoice comes afterwards. It has the figure at the top of the German manufactory, and it too has the words which would plainly indicate to a person of common sense that he was buying a "*Singer*" not made by *Singer*, but by somebody else. Then we come to the evidence of the sales in the particular cases. There were only two sales proved, and they were sales by persons sent by the *Singer Company* to get evidence. They knew perfectly well what they were buying. They were not deceived. Now, is there any evidence that any single individual ever bought a machine from the Defendant upon the supposition that he was buying one of the Plaintiff company's machines? No. But it has been argued that those who immediately bought of him were not deceived, inasmuch as they bought as retail sellers, yet that they might be enabled to represent to their customers that they were machines manufactured by the Plaintiff company. The answer to that is, that if they did so, they did what the Defendant never authorized them to do; because, if they sold as they bought, they ought to have given, when they resold, to every customer this book of directions for use. That argument, therefore, entirely fails. Moreover, there is not a tittle of evidence from beginning to end that any single buyer from any retail seller bought on the supposition that he was buying a machine manufactured by the Plaintiffs. Then, to my mind, the action entirely fails. The learned Vice-Chancellor came to the conclusion, as a matter of inference from the evidence, that there had been such a misrepresentation that persons who bought them might be deceived into the supposition that they were buying the Plaintiffs' machines. As to that I can only say that, sitting as we do here to review that decision, and exercising the functions of a jury, which the Vice-Chancellor did also, if we were in any doubt whether the Vice-Chancellor was right or wrong in that inference, we ought not to overrule it; because I hold that the Court of Appeal has no right to overrule the Judge on a question of fact, unless they are satisfied on the evidence that the inference of the Judge was wrong. Just as we ought not to set aside the verdict of a jury unless we are satisfied the jury was wrong. It is not enough to say that if we were sitting on the jury we should come to a different conclusion. Therefore, taking that to be the principle on which we are acting, I come to the conclusion clearly, in my own mind, that the inference drawn by the learned Vice-Chancellor is entirely erroneous, and that the evidence in this case does not warrant the conclusion that anything which the Defendant did connected with the sales of these machines was calculated to mislead a purchaser or anybody else into the supposition that he was buying a machine manufactured by the *Singer Company*. As I have said before, the idea seems to have possessed the mind of the company, and to a certain extent the minds of those who have represented the company here, that the *Singer Company* had some special prerogative either in the manufacture of *Singer* needles or sewing machines, or in the name "*Singer*." I think that is an entire mistake. If any person sold a machine, simply calling it "the *Singer* machine," then another question would have arisen. Then would have arisen the question whether a buyer at this time would understand by that that he was buying a machine manufactured by the *Singer Company*, or whether the word "*Singer*" was merely descriptive of the kind of machine by whomsoever made. Just like the name "*Hansom*" in the case of a hansom cab, which has been so often spoken of, and which is a very good illustration. No man, speaking at the present day of a hansom cab, speaks of it as a cab made by Mr. *Hansom*; but he speaks of the kind of cab which bears that name. Possibly, the time has come when the *Singer* machine, if it were called a "*Singer* machine," might now be popularly understood to mean, not a machine made by anybody of the name of *Singer* or the *Singer Company*, but a machine of the description and kind known as the "*Singer* machine." However, as I have said, that question does not arise, because the Defendant never did sell any of his machines as the "*Singer* machines." I would only further observe that whenever that question does arise there is a great body of evidence before us now to shew (I do not say it is altogether conclusive, but tending to shew) that at all events at the present time the word "*Singer*" has become in popular use and acceptation a word of description rather than a word denoting the maker. It is enough to say now that in this case that is not the question. The question is here whether the Defendant has represented the machines of his company as being machines made by the *Singer Company*. For these reasons I think there is no evidence to justify us in finding that he has.

Solicitor for Plaintiffs: *John Nicholas Mason.*
Solicitors for Defendant: *Michael Abrahams & Roffey.*

J. B. D.
M. W.

PETERS *v.* LEWES AND EAST GRINSTEAD RAILWAY COMPANY.

[1879 P. 240.]

C. A.
1881
July 15.

Railway Company—Lands Clauses Act, 1845, *ss.* 7, 9—*Sale by Trustees for Persons absolutely entitled—Married Women entitled for Separate Use—Trustee acting as Surveyor under the* 9*th section—Power of Sale, Determination of.*

19 ChD
626-8
22 ChD 2

A testator devised his residuary real estate (which comprised land in respect of which a notice to treat had been given by a railway company) to trustees in trust for his wife for life, and after her death to assure the same to his two married daughters, in equal shares, for their separate use as tenants in common, with a gift over in favour of their issue in events which did not happen; and "for the purpose of division" he empowered his trustees to sell his residuary estate; and declared that his trustees might receive payment for all business done by them in relation to the estate.

The testator's wife, his two daughters and their husbands, survived the testator: and after the death of the widow the trustees sold and conveyed the lands to a railway company for a price which had been determined by the valuation of two surveyors, as provided by the 9th section of the *Lands Clauses Act*, 1845, the trustees having first, for the purposes of such valuation, appointed one of themselves as the surveyor on their behalf. One of the testator's daughters disputed the validity of the sale, and brought an action to restrain the company from taking or using the land:—

Held, first, that whether the power of sale under the will was still in existence or not, the trustees did not exercise it, but professed to convey the land under the provisions of the *Lands Clauses Act*, and therefore the validity of the sale must be determined without reference to the power.

Secondly, that the trustees, being trustees of the land for *femes covertes* who were absolutely entitled for their separate use, were not persons competent to contract with a railway company for the sale of the land under the 7th section of the *Lands Clauses Act*, 1845, and that the sale was for that reason invalid.

Thirdly, that the sale was also invalid by reason of the appointment by the trustees of one of themselves as surveyor to value the land under the 9th section of the *Lands Clauses Act*, 1845.

Per Jessel, M.R.: The mere fact of trustees having the price fixed by two surveyors, and then agreeing to sell for that price, instead of first agreeing to sell for a certain price and then testing the price by the valua-

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tion of two surveyors, would not in itself invalidate a sale under the 9th section of the *Lands Clauses Act.*

Per Jessel, M.R.: The power of sale given to the trustees by the will did not determine on the death of the tenant for life, but might have been exercised within a reasonable time afterwards for the purpose of dividing the property.

THIS was an appeal from a decision of Vice-Chancellor *Hall* (1).

Thomas Hopkinson, by his will, dated in May, 1874, appointed *J. Gaines, W. R. M. Glasier,* and *G. H. B. Glasier,* his executors and trustees, and gave his residuary real and personal estate unto and to the use of his trustees, upon trust to pay the income to his wife *Caroline* during her life, and after her death to transfer, assign, or otherwise assure the same unto his two daughters, *Caroline Gaines,* the wife of *J. Gaines,* and the Plaintiff, *Catherine S. Peters,* in equal shares, for their separate use as tenants in common, with a gift over in favour of their respective issues in an event which did not happen. And "for the purpose of division" the testator thereby empowered his said trustees, or the survivors or survivor of them, his executors, administrators, or assigns, to sell all his said residuary estate by public auction or private contract. And he declared that his trustees should be entitled to charge and to be paid out of his trust estate for all business (whether strictly professional or not) done by them in relation to his said trust estate in the same manner as if they had not been trustees.

The testator died on the 28th of July, 1878, leaving his wife *Caroline* and his daughters him surviving. The will was proved by *J. Gaines* and *W. R. M. Glasier* alone, *G. H. B. Glasier* having renounced probate.

Shortly before the testator's death the *Lewes and East Grinstead Railway Company,* under their Act, which incorporated the *Lands Clauses Act,* 1845, served him with notice to treat for the purchase of part of a freehold house and grounds called *Kingscote,* of which he was the owner in fee simple. The testator gave the company notice of the particulars of his claim, but died before anything further had been done.

On the 9th of January, 1879, his two trustees served notice on the company requiring them to purchase the whole of the *Kingscote* property, on the ground that it was a "house" within the meaning of the 92nd section of the *Lands Clauses Consolidation Act*, 1845, and in the same month they and the testator's widow commenced an action against the company in order to compel them to take the whole of the property. In this action a sum of £4950 was paid into Court with liberty to the company to take possession of the property.

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(1) 16 Ch. D. 703.

On the 29th of January, 1879, the widow died, and the reversionary interest of the two daughters fell into possession. Shortly afterwards the company communicated to the trustees their willingness to take the whole of the property, and on the 25th of February, 1879, they gave them notice of the summoning of a jury to determine the purchase-money under the provisions of the *Lands Clauses Act*, 1845, and at the same time offered the sum of £3300 for it.

The trustees did not accept this offer, but entered into negotiations with the company for a sale by private contract, and it was agreed that the purchase-money to be paid should be determined by the valuation of two able practical surveyors in accordance with the 9th section of the *Lands Clauses Act*, 1845.

One of the two trustees, *W. R. M. Glasier*, happened to be a surveyor, and accordingly he was appointed by himself and his co-trustee to act as their surveyor for the purposes of the valuation; and the company appointed *H. Jones* a surveyor on their own behalf. The two surveyors thus appointed made their valuation on the 3rd of March, 1879, and fixed the purchase-money to be £3400, and the surveyors' fee to be £100.

The Plaintiff and her husband were dissatisfied with this valuation, and refused to concur in the sale. However, the trustees proceeded with the sale, and on the 22nd of August, 1879, they conveyed the property to the company, the trustees and the company being the only parties to the indenture.

By this indenture, after reciting, *inter alia*, the will of the testator, including the power of sale, and that under the powers of the Act the company had agreed with the trustees for the purchase of the property in fee simple, and that it was agreed that the purchase-money or compensation should be determined by two able practical surveyors, and that *H. Jones* and *W. R. M.*

Glasier, being two able practical surveyors duly appointed, had determined the purchase-money and compensation at £3400, the two trustees, *Gaines* and *Glasier*, "in exercise of the powers for this purpose given them by the *Lands Clauses Act*, 1845, or otherwise," granted the property and all such estate and interest therein as they were possessed of or entitled to or were by the said Acts of Parliament or otherwise empowered to convey to the company, their successors and assigns for ever.

The present action was brought by Mrs. *Peters*, in which she alleged that the sum of £3400 was a totally inadequate price for the property, and claimed an injunction to restrain the Defendant company from entering upon or using the property or executing works thereon until the amount of purchase-money and compensation payable for the property should have been duly determined and paid; and they claimed damages in respect of the taking of the property by the company otherwise than in accordance with their statutory powers.

The Vice-Chancellor, learning that the validity of the sale was disputed, declined to try the question as to the adequacy of the price. The attendance of witnesses as to value was therefore dispensed with, and the argument was confined to the question of law.

The Vice-Chancellor made a declaration that the company had not acquired a good title to the Plaintiff's moiety of the property, and that the Plaintiff and her trustees were entitled to enjoy that moiety as tenants in common with the company.

From this judgment the company appealed.

W. Pearson, Q.C., and *Prior*, for the Appellants:—

The trustees had power to sell under the will. The deed of conveyance recited the will, and professed to sell in exercise of the powers given them by the *Lands Clauses Act* "or otherwise." The Vice-Chancellor held that the power of sale had come to an end when the widow died; but that is not the case, for it was given to the trustees for the purpose of dividing the property, and therefore could be exercised within a reasonable time after the death of the tenant for life: *Lantsbery* v. *Collier* (1).

(1) 2 K. & J. 709.

But if the sale cannot be supported under the power, it is good under the Act. The 7th section of the *Lands Clauses Act* gives power to trustees to sell on behalf of their *cestuis que trust* whether infants, lunatics, or *femes covert*; and it makes no difference that the *feme covert* has the estate for her separate use. The only other point is the appointment of *Glasier* as one of the surveyors to fix the purchase-money. Why should he not act? He had no interest in the property. There was no conflict in his case between interest and duty. His valuation was as good a check upon the company giving too low a price for the land as that of any other person could be. Whether the price was first fixed and then its sufficiency tested by the valuation of two surveyors, or the price was in the first instance to be ascertained by valuation, can make no difference.

Kekewich, Q.C., and *Shebbeare*, for the Plaintiff, were not called on.

JESSEL, M.R.:—

This appeal from the decision of Vice-Chancellor *Hall* raises questions almost as important as could be raised within the compass of so small a case, and I shall express my opinion upon each of the questions, although it is not necessary to decide them all in order to decide the case.

The first point which is considered by the Vice-Chancellor is a very curious point indeed; it is as to the time during which a power of sale given by a will will last. No doubt you cannot have a power of sale to change the nature of the interests limited by the instrument so as to exceed the limit of time prescribed by the rule against remoteness or perpetuity; and as it has long been the habit of conveyancers to frame powers of sale in general terms, the Courts have had to consider how they are to be limited so as to bring them within the rule; and the Courts have decided that the powers, although framed in general terms, are limited by the nature of the limitations contained in the settlement or will, so that when, by reason of the expiration or cesser of the limitations contained in the settlement, whether made by will or deed, the absolute interests come into existence, then the power is considered to be at an end; and, inasmuch as no settlement can be valid either by will or deed under which absolute limitations do not come into existence within the prescribed period, that makes all the powers valid. That is the doctrine which is laid down not only in *Lantsbery* v. *Collier* (1), but in a long line of cases. But that does not appear to me to have any application to a case where the power is to take effect on the coming into existence of the absolute limitations; or, to put it in other words, it does not apply to a power where there is nothing but absolute limitations of interests given in the first instance. Suppose, for instance, a man having a dozen children gives his real and personal estate to trustees upon trust to divide amongst his twelve children, and, for the purpose of making the division, he empowers the trustees to sell. That is not, in my opinion, an invalid power. The trustees are bound to make a division within a reasonable time. In fact, as we know, it has been decided that if they postpone very long, without express power to postpone, they are guilty of breach of trust. Therefore the power of sale is also limited in the nature of the case to a reasonable time, and no one would say that twenty-one years was a reasonable time. Therefore it appears to me that the power would be valid. Does it make any difference if there is a preceding life estate? If the limitation is to a person for life, and, after the death of the tenant for life, upon trust to divide amongst my twelve children, with power, for the purpose of division, to sell, why should that be void? If a limit of twenty-one years is too long for a reasonable period in one case it is too long in the other. In the same way it appears to me the power would be valid, having regard to the nature of the settlement, and not the less because all the children might have attained the age of twenty-one years. I agree if all the children, being free from disability, concur in calling upon the trustees to convey, that puts an end to the trust, and, of course, to the power also. It puts an end to the trust to divide. They might call upon the trustees, instead of dividing it, to convey to a purchaser, but, subject to that, it does not appear to me that there is any objection to the power; that is, that it is limited from the nature of the purposes for which it is to be used. In my opinion, it is as good a limitation of the period within which the power was to be exercised, as the limitation of the period ascertained from the nature of the limitations when the power is exerciseable during the existence of the limitations.

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(1) 2 K. & J. 709.

When I look at this will I think the true view of it is that the power is not to be exercised until after the death of the widow. No doubt it is about as badly framed a will as you could well have, but when you look at it the gift is thus: after the death of the widow to her two daughters, with a gift over, if either is dead, to her issue at twenty-one. Then, for the purpose of division (and that is all), the trustees have the power of sale. For the purpose of division amongst whom? Between any persons, it seems to me, who are entitled to division, whether they are the two daughters themselves, or one daughter and the children of the other. It appears to me that they are the people to call for division. It is more convenient to make a division by selling the property and dividing the money than by allotting undivided shares, or allotting one property to one and another property to another. Therefore it appears to me that the power is exerciseable, and there is no objection to it on the ground that it is unlimited. A general power exerciseable at any period, of course, would be bad in law, but it seems to me that this power was good in law, and if the sale had been made for the purpose of division under the power the trustees could have exercised it.

I now come to the next question. Did they exercise it? I am quite clear that they did not. That is a question again to be answered by looking at the documents. The first fact which strikes one as against the exercise of the power is that the transaction began before the power was exerciseable. It was in the lifetime of the testator that the first notice was given by the railway company to take the property; it was after the death of the testator, but during the lifetime of the widow, the tenant for life, that the trustees called upon the railway company to take the whole of the property. Of course, all that could not be under the power. Then the action was instituted, and the money paid into Court. Then the tenant for life died. Now, I agree to this, that although the whole thing began, not as an exercise of the power, yet, if the power came into existence afterwards, the trustees could still make a title under the power if they thought fit so to do. They might say, "We have now got the power of sale, we will give the go-by to all the notices and so on that accrued before, and we will now sell under the power." But they did not do anything of the kind, they professed to act under the powers of the *Lands Clauses Act*, 1845. I shall have to discuss this presently, but I will assume for the moment that they had properly appointed a surveyor on their side to meet a surveyor appointed by the company to check the price for which the land was to be sold; and when I look at the conveyance, there is not a word about the exercise of the power. No doubt there is the word "otherwise" in the witnessing part, but that obviously does not mean the power, and it is quite clear when you come to look at the words, that what they convey is, "and all such estate, right, title, and interest in and to the said messuage lands and hereditaments as they the said parties hereto of the first two parts respectively now are or is seised or possessed of or entitled to or are or is by the said Acts of Parliament or any or either of them or otherwise empowered to convey." It is quite plain they did not mean that. That would have conveyed the minerals. They did not intend to convey anything, except under the Act of Parliament. If it had been what they were seised of or otherwise empowered to convey, they were not acting under the power. Indeed, the Act of Parliament which protects the minerals says that, in purchases by the railway company, they are not to pass unless mentioned; and no doubt now trustees are empowered to contract to sell land reserving the minerals, but it is a very special power given by Act of Parliament, and it must be exercised in those terms. It is obvious that what they meant to convey was what they had power to convey under the Act of Parliament, and nothing else, and that they did not intend to exercise any discretion given to them under the power. Any intention on their part to sell for the purpose of division was out of the question; they simply intended to sell as trustees under the Act of Parliament.

The next question on which I differ to some extent from the Vice-Chancellor is this: if trustees sell under the *Lands Clauses Act*, why may they not agree to sell at a price to be fixed by two surveyors, afterwards adopting that price? I so far assent to the Vice-Chancellor's observations that a contract to sell at a price to be fixed by two surveyors is not *per se* enforceable, but if they adopt that which is the ordinary practice, if the surveyors fix the price, and then, the price being fixed, they approve of it—it is an exact compliance with the Act of Parliament—that is, they have approved of the price, and they sell for not less than the price. It is not a mere arrangement not enforceable to sell for what the two surveyors shall fix, because they cannot do that as trustees, so as to make it obligatory upon them; it destroys their right of afterwards adopting the price, if they think the price of the surveyors is a good price. In that way it appears to me that the ordinary practice may be supported without saying that the law as regards contracts stated by the Vice-Chancellor is not good law.

Upon the next point I not only agree with the Vice-Chancellor, but I take even a somewhat stronger view. The question is whether, under the clause of the Act of Parliament which empowers trustees to convey (clause 7), a trustee for an absolute owner, being a married woman having the property settled to her separate use, can convey; and instead of treating it in the way the Vice-Chancellor treats it, as being dangerous or doubtful, I think it is not doubtful at all. There is no distinction, to my mind, between a trustee for a married woman absolutely entitled to her separate use and not restrained from anticipation, and a trustee for a man. Would anybody assert that under the 7th section, because the legal estate was outstanding in a trustee for a man, that trustee could sell, and make a title to bind his *cestui que trust*. No one would suggest such a thing. Nor does it appear to me, when you examine the words, that the same considerations do not apply to a married woman absolutely entitled to her separate use. [His Lordship read sect. 7 of the *Lands Clauses Act*, 1845, and continued:—] It is on behalf of a *cestui que trust* under disability—a person who cannot convey—and that is the reason why nobody has dreamt of applying it to a bare trustee for a man. The same thing must apply to a bare trustee for a woman who is entitled for her separate use free from restraint on anticipation. The same doctrine applies to a bare trustee for two men seised in fee in equal shares as tenants in common. The trustee cannot convey for them. How can he for two women, both of them entitled to their separate use free from restraint on anticipation? It seems to me, therefore, in this case that the trustees had no power whatever to convey under the Act of Parliament.

The next point is also one of very general importance. The trustees appointed one of themselves, who happened to be a surveyor, to value on behalf of the trustees. The question we have to decide is whether a valuation so made is a valid valuation under sect. 9 of the *Lands Clauses Act*. Here again I agree with the Vice-Chancellor that it is not. We must first of all look at the words. [His Lordship read the 9th section of the *Lands Clauses Act*, 1845, and continued :—] The natural meaning of these words is not that the other party shall nominate himself any more than the promoters of the undertaking. It means somebody else. That is the natural meaning of it. I do not think that quite decisive, but this consideration appears to me to be quite decisive, and that is what is the object of the nomination. It is a check upon the person on whom the power of sale is conferred. He may be a person having no interest in the property whatever. There is to be a check on the price fixed by him. Can that check be by himself? The whole theory of the Act is that an independent person is to be called in.

As regards the form of the order, the Plaintiff does not deny the right of the company to take the land on paying a proper price for it, and therefore we ought to declare that she is not bound to accept the price which has been fixed by the two surveyors in the way I have mentioned, but that she is entitled to have the price ascertained pursuant to the terms of the *Lands Clauses Act*, and to obtain payment of the price when ascertained from the Defendant company, with liberty to apply.

BRETT, L.J. :—

As to the question whether the power of sale for the purpose of division was in existence and force or whether it was at an end, I think we are not in a position to give a judicial opinion upon it. The simple opinion of the Master of the Rolls, I say unfeignedly, is of the greatest value; my own simple opinion would be of little value.

But I am clearly of opinion that even if that power was in existence it was not exercised. It seems to me that every document and every fact and every circumstance in this case shew that it was not acted upon at all. Every step in the whole proceeding was taken under the *Lands Clauses Act*, and under nothing else, and if they acted under the *Lands Clauses Act* those proceedings cannot be sustained unless the valuation can be sustained. It seems to me that it would be contrary to every principle of right, contrary to every view of the construction of the Act of Parliament, and contrary to justice, that where the Act of Parliament (and it is clear to my mind that it does) says that these valuers are placed in that position for the purpose of being a check on the persons to whom the power is intrusted, one of those persons can exercise that power himself. It would be to do away at once with the spirit of the Act of Parliament. The meaning of the words is clear that a check was intended, and by this process the check would be done away with. I am therefore clearly of opinion that the judgment of the Vice-Chancellor must be affirmed.

COTTON, L.J.:—

I am of opinion that the appeal fails, and that the judgment of the Vice-Chancellor must be affirmed, with the variation which has been suggested by the Master of the Rolls. We have to consider whether the company can hold the land under the exercise of the power contained in the will or under the provisions of the *Lands Clauses Act*. I express no opinion on the question as to whether this power of sale is existing. I in no way express an opinion that it is not, but in my view it is not necessary to the determination of this case to decide that point, for I come to this conclusion, that the trustees never did act in exercise of the power of sale, assuming it to be existing. It was necessary, in order to shew that there had been an exercise of that power, to prove that the trustees exercised the discretion given to them by the will. But everything, in my opinion, shews the contrary. [His Lordship then referred to the facts of the case, and continued:—]

In my opinion, if the company can maintain their case it must be under the *Lands Clauses Act*; but on both the grounds that have been dealt with by the Master of the Rolls I am of opinion that they fail to do so.

Although clause 7 of the Act refers in terms to trustees as persons who are able to convey, the latter part of the section shews that it was not intended to substitute them for persons who are beneficially entitled and under no disability whatever to sell. The trustees are to sell, and the sale by them is to be as effectual as if the person beneficially interested had sold, and had been under no incapacity or disability.

Then we come to the 9th section, which requires the price to be fixed, which, as to persons who are under disability and are empowered to sell, puts a check, in my opinion, upon what they may do—a check on the exercise of the statutory authority given to them; and the provisions of the statute must be strictly and in substance followed if the parties are to rely on the exercise of that power. The price at which property is to be sold by persons who are acting solely under the Act, and who are otherwise incapable of selling, is to be not less than that which is fixed by two able practical surveyors. The nomination of Mr. *Glasier* was not, in my opinion, a compliance with the substance of the 9th section. If it were, what would there be to prevent people who are authorized to do what they could not otherwise do from selling at an improper price? To say that there is any check on trustees or on the tenant for life as binding the remainderman, if the trustee or the tenant for life nominates himself as valuer, would be ridiculous. Therefore, as I hold that the intention of the statute is, to put a check on the sale by persons acting solely under the authority of the Act, the provisions of the 9th section have not, in my opinion, been complied with in this case. I agree with the Vice-Chancellor entirely, irrespective of any question as to whether the price was sufficient. The price has not been so fixed as to bind those interested if they are dissatisfied with the amount of the valuation.

Solicitors for Plaintiff: *Wyatt & Barraud.*
Solicitors for Defendants: *Cope & Co.*

M. W.

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1881
July 4.

[1876 G. 242.]

Will—Construction—Remoteness—Gift to Class—Substitution.

A testator directed his trustees, after the death of the longest liver of his son, his daughter, and any widow whom the son might leave, to sell his real estate and to stand possessed of the proceeds and of the rents and profits until sale, upon trust to pay and apply them "unto and equally amongst all and every the child and children of my son *W.* and daughter *M.* share and share alike, and the lawful issue of such of them as may be then dead leaving issue, such issue to be entitled to no more than their parent or respective parents would have been if living." He directed that if his daughter's son then living should die without leaving issue, or, leaving issue, all of them should die under age and unmarried, the trustees should pay the share which would have been payable to him under the above trusts to the children of *J.*; and that if the testator's son died without leaving issue, or all of them died under age and unmarried, the trustees should pay the share which would have been payable to them under the trusts aforesaid to the children of *J.* and *M.* The heir-at-law claimed the *corpus* as undisposed of, on the ground that the disposition of the proceeds of sale was void for remoteness as being a gift to a class not ascertainable till at or after the death of the son's widow, who might be a person unborn at the testator's death:—

Held, that the gift was not a gift to such children of the son and daughter as should be living at the period of distribution and the issue of such of them as should be then dead, but a gift to all the children of the son and daughter, with a gift over by way of substitution of the shares of such of them as might die before the period of distribution leaving issue—that when the gift over of any share was void for remoteness the original gift remained unaffected—and that the heir-at-law had no title.

JACOB GOODIER, by will, dated the 22nd of November, 1837, gave his real estate to trustees upon trust to pay out of the rents to his daughter, *Mary Beech*, an annuity of £80 for her life, and after her decease, during the life of the testator's son *William* and of any widow of *William*, to pay one half of such annuity among such children of *Mary Beech* as might be then living and the lawful issue of such of them as might be dead leaving issue. And as to the second half of the annuity of £80, and as to the further yearly sum of £180, out of the rents to pay the same for the benefit of the testator's son *William* during his life or until he should become bankrupt, &c. And after *William's* decease to pay the same to any widow of *William*, during her life, or so long as she should continue a widow and reside in *England*, and in case of her marrying or ceasing to reside in *England*, then to divide the same between such of the children of *William* as should be then living, and the issue of such of them as should be dead. The testator then made a disposition of the surplus rents remaining after payment of the annuities, and proceeded as follows:—

"And from and after the death of the longest liver of my said son *William* and his widow, if any (or of such widow ceasing to reside in *England*), and my daughter *Mary*. Then I direct that my said trustees, or the survivors or survivor of them, and the heirs, executors, administrators, and assigns of the survivor, do and shall stand and be possessed of and interested in the same hereditaments, rents, and premises upon the trusts and for the intents and purposes hereinafter expressed and declared of and concerning the same, that is to say, upon trust that they the said *James Hedley*, *Alfred Binyon*, *John Guest*, and *George Thompson*, and the survivors and survivor of them, or the heirs, executors, administrators, or assigns of such survivor, do and shall, after the decease of the longest liver of them my said son *William* and his widow, if any (or of her ceasing to reside in *England*), and my daughter *Mary*, sell and absolutely dispose of all and singular the said hereditaments, rents, and premises, together or in parcels, by public auction or private contract, in such manner as to them my said trustees or trustee for the time being shall seem meet for the best price or prices and most money that can in their or his judgment be reasonable had or gotten for the same respectively. And as to, for, and concerning the money to be raised from or by such sale or sales, and the rents, issues, and profits to be received and to arise and become due and payable from all and singular the said hereditaments and premises after the decease of the longest liver of my said daughter and son *William* and his widow, if any (or of his widow ceasing to reside in *England* as aforesaid), until the same shall be sold as aforesaid, I do hereby direct and declare that my said trustees and trustee for the time being, his heirs, executors, administrators, and assigns, shall stand possessed of the same upon trust that they my said trustees, or the trustees

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or trustee for the time being, do and shall pay and apply the money to be raised as aforesaid unto and equally amongst all and every the child and children of my said son *William* and daughter *Mary* share and share alike, and the lawful issue of such of them as may be then dead leaving issue, such issue to be entitled to no more than their parent or respective parents would have been if living."

The testator went on to provide that if the son then living of his daughter *Mary* should die without leaving lawful issue, or leaving issue and all of them should die under age and unmarried, then the trustees should pay the share of money which would have been payable to him under the aforesaid trusts to the children of the testator's son *Joseph*. He further provided that if *William* should happen to die without leaving any lawful issue, or leaving any, all of them should die under age and unmarried, then the trustees should pay the share which would have been payable to the children of *William* under the trusts aforesaid to the children of *Joseph* and *Mary*.

The testator died in 1842. *Mary Beech* died in 1855, leaving a child, who was still living. *William Goodier* died in 1867, leaving eight children. His widow was still living and residing in *England*. The Plaintiff in the present action was the son of *Joseph Goodier*, deceased, and the heir-at-law of the testator, and he brought this action to establish his title to the testator's real estate, subject to the annuity to the widow, on the ground that the above dispositions of the *corpus* were void for remoteness.

The action was tried before Vice-Chancellor *Hall*, and on the 19th of February, 1881, his Lordship gave a judgment declaring that the trusts of the *corpus* were not void for remoteness, and giving all parties their costs out of the estate.

The Plaintiff appealed.

Rigby, Q.C., for the Appellant:—

The property is not distributable till after the death of the son's widow, who might be a person not *in esse* at the testator's death. That would not of itself be any ground of objection to the validity of the limitations if the class must necessarily be ascertained within the limits of the rule against perpetuities, but here the

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class of persons to take cannot be ascertained until too remote a period. The issue of children of *William* and *Mary* who die before the period of distribution form part of the class, and what issue will thus be let in cannot be ascertained till the period of distribution.

Kekewich, Q.C., and *Ingle Joyce*, for a child of the testator's son *William*:—

We have here first an original gift to the children of *William* and *Mary*, and if the disposition had stopped there no question could have arisen, it being clear that there is no objection to a gift of a life estate to an unborn person, and a gift over on his death to a class of persons, if they are necessarily ascertainable within legal limits. We have then substitutionary gifts to the issue of such of these children as die before the period of distribution. The case is entirely different from that of a gift to such children of *William* and *Mary* as are living at the period of distribution and the issue of such of them as are then dead. In that case there would be no gift except to a class, to be ascertained at the time of distribution. Here we have a gift to a class ascertained within the legal limit, and a substitutionary gift over of the shares of those who die before the period of distribution. If this gift over is bad the original gift remains. *Baldwin* v. *Rogers* (1) shews the difference between these two forms of gift, and is decisive of the present case.

[JESSEL, M.R., referred to *Pearks* v. *Moseley* (2).]

The observations of the Lord Chancellor in that case (3) are in our favour.

Robinson, Q.C., and *Romer*, Q.C., for another child:—

This is a gift to all the children of *William* and *Mary*, with substitutionary gifts of the shares of those who die before the period of distribution: *Gray* v. *Garman* (4).

[JESSEL, M.R.:—In that case there is an express substitution—"in case any of them shall be dead."]

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(1) 3 D. M. & G. 649.
(2) 5 App. Cas. 714.

17 Jur 267

(3) 5 App. Cas. 719.
(4) 2 Hare, 268.

Re Bennett's Trust (1). The gift to the class is valid, though the substitutionary gifts may in some cases be invalid: *Jarman* on Wills (2), and cases there referred to. *Cattlin* v. *Brown* (3) is in point as to the question of remoteness in such a case.

Rigby, in reply:—

No doubt if there is a gift to a class ascertained within the allowed period, and independent gifts over of shares in such a way as to offend against the rule of perpetuities, the gifts over can be rejected. In those cases there is first an unfettered gift to a class. But here there is one clause which has to be construed altogether, and in that clause is contained a qualification which makes the gift useless on the happening of an event which may not happen within legal limits. The gift must be taken as a whole and not be split up, for which *Pearks* v. *Moseley* (4) is an authority.

[JESSEL, M.R.:—The gift over of the shares of *William's* children, if they die under twenty-one and unmarried, shews that the testator intended a child who attained twenty-one or married to take, though he might not survive the period of distribution.]

The Court cannot dissect a gift for the purpose of avoiding the rule against perpetuities. Supposing that rule out of the way, this clearly would be a gift to a class not ascertainable till the time of distribution.

JESSEL, M.R.:—

This case will turn on a point that does not appear to have been raised before the Vice-Chancellor. The question really is what is the class to take. On reading the will I am satisfied that the gift to all the children of *William* and *Mary* and the issue of such of them as may be dead at the time of distribution cannot be treated as a gift to such of the children as are then living and the issue of such of them as may be then dead. Supposing that, standing alone, it could be so construed, the clause which directs that if the son of the testator's daughter *Mary* who was living at the date of the testator's will should happen to die without leaving any lawful issue, or leaving any, all of them should happen to die under age and unmarried, then the share which would have been payable to him under the trusts aforesaid shall be paid to the child or children of the testator's son *Joseph* is very important, for it shews that the son of *Mary* would, were it not for the gift over, take a share independently of the question whether he survived the period of distribution or not. Then as regards *William*, there is a gift over in case he dies without leaving lawful issue, or leaving issue, all of whom die under age and unmarried. That shews that if they attain the age of twenty-one or marry, they are to take under the preceding gift whether they do or do not survive the period of distribution, because the gift over is of the share which would have been payable to the child or children of the son *William* under the trusts aforesaid. These clauses shew that the first gift is not to the children living at the period of distribution, but to all the children. Then follow the words, "and the lawful issue of such of them as may be then dead leaving issue." When once the conclusion has been arrived at that the first part of the sentence includes children who do not survive, the second part must be substitutional, for it would be absurd to suppose that if a child dies leaving issue, his representatives can take a share under the first part, and his issue take another share under the second, the meaning clearly being that the issue are to have the share which the parent, if he had survived the period of distribution, would have actually received. I agree that there is a difficulty, the words used not being appropriate to a clause of substitution; but having regard to the clauses to which I have referred, and which treat children who do not survive the period of distribution as objects of gift, it would be too strong a construction to confine the first part of the gift to children living at the period of distribution. We must therefore read the clause as making a gift to all the children, but if any die before the period of distribution leaving issue, then there is a gift over to such issue. The result is that there is a gift to a class who must be ascertainable within the prescribed period subject to gifts over of the shares in certain events, and if any of those gifts over are invalid, the original gift of those shares remains unaffected. It seems to me, however, that the trust for sale is bad, as it is not

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(1) 3 K. & J. 280.

(2) 4th Ed. p. 271.

(3) 11 Hare, 372.

(4) 5 App. Cas. 714.

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limited to take effect within the period of a life in being and twenty-one years after. But there is a trust of the property and the rents and profits thereof until sale, for the persons to whom the proceeds of the sale are bequeathed, and if the trust for sale is bad, still that trust is good, and will carry the property to them. It therefore appears to me that the whole *corpus* is effectually disposed of, but the declaration made by the Vice-Chancellor requires alteration, since some of the dispositions made by the testator are obnoxious to the rule against perpetuities.

BRETT, L.J.:—

I have nothing to add.

COTTON, L.J.:—

I am of the same opinion. The question is whether the testator has given an interest to a class who must be ascertained and take vested interests within the period allowed by the rule against perpetuity. That turns on the direction that the trustees shall, after the death of the longest liver of certain persons, "pay and apply the money to be raised as aforesaid unto and equally amongst all the children of my said son *William* and daughter *Mary* share and share alike, and the lawful issue of such of them as may be then dead leaving issue, such issue to be entitled to no more than their parent or respective parents would have been if living." Now, no doubt if you follow the mere words and do not regard the sense, it may be said that this is a gift to one class to be ascertained at the period of distribution, and composed of children and issue, but when you regard the sense, you see at once that it cannot be so. There is nothing in the first part of the gift to limit the children who are to take under it to children who may be living at the death of the widow. It is then a gift to all the children of the son and daughter whether living or not at the period of distribution, and to the issue of such of them as may be then dead leaving issue. Unless we can find something to shew that there was an omission, we have no power to introduce into the first part of the sentence the words "then living." The clause contains no such limitation, and although we have not the expression "and in case any of them shall be then dead leaving issue such issue shall be entitled to the share or shares which their parent or respective parents would have been entitled to if living," but have only the inaccurate expression, "and the issue of such of them, &c.," we must construe the words fairly and see whether the latter expression is not used in the sense of the former. Now when we find that there is a vested interest given to the children without reference to their surviving the period of distribution, we must construe the limitations to the issue, without any regard to what the result will be, as a gift over in substitution to the issue of such of the children as may die before the period of distribution leaving issue. That will leave untouched the gift to the children who die without leaving any issue, and if by rule of law the substitutionary gift in favour of the issue of any of the children cannot take effect, then the original gift to the children will take effect. The *corpus* then is effectually given, because it is given to a class to be ascertained within the limits of perpetuity, and to take a vested interest within those limits, subject to gifts over, which if they are beyond the limits fail and leave the original gift unaffected. No doubt the testator intended that until the death of the widow it should not be finally ascertained who should take, that is to say, he, knowing nothing about the rules as to perpetuity, intended to defeat by a gift over the vested interest of each child who died before her. But that is not the question. The question we have to consider is whether he has given a vested interest to persons to be ascertained within the limits of perpetuity. If so, that is sufficient, and that gift is good although the testator may ineffectually have attempted to defeat the vested interest by a gift over which fails in consequence of a rule of law.

As to the words at the end of the clause, "such issue to be entitled to no more than their parent or respective parents would have been entitled to if living," I think that means the issue are to take the shares their respective parents would have taken if living, and even if there is an ambiguity in the words, it is not enough to cut down the clear gift to all the children in the previous part.

Some discussion then took place as to the form of declaration to be substituted for that made by the Vice-Chancellor, and it appearing that there were not parties before the Court to argue the question whether the gift over was effectual as to the shares of children living at the testator's death, the Court merely made a declaration that the heir-at-law had no title.

Solicitors: *Pritchard, Englefield, & Co.; Gregory, Rowcliffes, & Co.*

H. C. J.

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Aug. 1, 2.

[1880 C. 127.]

Solicitor and Client—Mortgage by Client to Solicitor—Power of Sale—Appropriation of Rents by Mortgagee in Possession.

A solicitor advanced money to his client on a second mortgage, in which was inserted a power of sale exerciseable at any time without the usual proviso requiring that notice should be given, or some interest should be three months in arrear; and it was not shewn that he explained to the client that the power was not in the usual form. The solicitor afterwards took possession, and for several years received the rents, which, together with some payments made by the mortgagor, exceeded the interest on both mortgages. He then sold the property without notice.

Held (affirming the decision of *Fry*, J.), in an action by the mortgagor against the solicitor, that the omission from the power of sale of the usual qualifying clause was a breach of duty, and that the mortgagee was liable in damages as for an improper sale, unless it could be shewn that some interest was three months in arrear; and whether the absence of explanation did not make it improper even if there was interest in arrear, *quære.*

Held, that the fact that the mortgagee had received rents to an amount more than sufficient to pay the interest would not by itself prove that there was no interest in arrear if no appropriation was shewn to have been made.

The *dictum* in *Brocklehurst* v. *Jessop* (1) overruled.

But *held*, that, as in an account sent by the mortgagee to the mortgagor the interest was treated as satisfied up to a certain day out of the rents, there was evidence of an arrangement that the rents should be applied in discharge of interest, and that, as the final account shewed that if the rents were thus appropriated there would be no interest in arrear at the time of sale, the sale was improper.

Whether a mortgagee in possession having a balance of rents in hand more than sufficient for payment of the interest and all expenses he has incurred can be heard to say that interest is in arrear so as to justify a sale because no account has been rendered and no appropriation made, *quære*.

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(1) 7 Sim. 442.

Held (reversing the decision of *Fry*, J.), that the difference between party and party costs and solicitor and client costs of the present action could not be given to the Plaintiff by way of damages.

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IN 1872, the Plaintiff having purchased a messuage, No. 110, *High Street, Ramsgate*, for £600, applied to the Defendant, who acted as his solicitor in the matter of the purchase, to procure him a loan of £500 on mortgage of the property. The Defendant procured a Mr. *Chapman* to advance £450 at £5 per cent. on a first mortgage of the property, and himself advanced the remaining £50 at £5 per cent. on a second mortgage of it, dated the 26th of March, 1872. This second mortgage contained an absolute power of sale exerciseable at any time, no condition being imposed that notice should be given or interest be in arrear. On the 7th of November, 1873, the Defendant advanced to the Plaintiff £300 on the security of a mortgage of the Plaintiff's stock-in-trade and effects, and of a third mortgage of the messuage. This third mortgage contained a similarly unqualified power of sale. It was alleged by the Defendant and denied by the Plaintiff that it was fully explained to the Plaintiff, before he executed the second and third mortgages respectively, that the power of sale was in the unqualified form. The Court considered that it was not established by the evidence that the explanation had been given. The Defendant acted as the Plaintiff's solicitor in all the mortgage transactions.

In January, 1875, the Defendant entered into receipt of the rents of the messuage, and continued in such receipt till the property was sold. The tenant, Mr. *Banks*, having, in 1877, offered to purchase it for £620, the Defendant ultimately agreed, under the power of sale in the second mortgage, to sell it to him for £630, the additional £10 covering the vendor's and purchaser's costs of the sale, the purchaser accepting the vendor's title, and the Defendant acting as solicitor for both parties. This sale was effected without notice to the Plaintiff, and was completed on the 1st of February, 1878.

The property at the time when possession was taken by the Defendant was let to Mr. *Banks* for £40 a year. In or about

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April, 1877, the Defendant sent a cash account to the Plaintiff. In this account the Plaintiff was debited with £62 7*s.* 5*d.*, the balance of a former account (which included the £50 mortgage debt), with five years' interest on £500 (the amount of the mortgage debts of £450 and £50) up to the 25th of March, 1877, with the £300 advanced on the subsequent mortgage, and with interest to the 6th of May, 1877, on the amount due on that mortgage, and with some other items amounting in all to £65 3*s.* 2*d.* On the other side were entered various sums paid by the Plaintiff, including a sum of £50 paid in August, 1876, and the rent received from *Banks* down to February, 1877, inclusive. The balance appearing due to the Defendant was £376 6*s.* 7*d.*, which, it will be observed, exceeded by £26 6*s.* 7*d.* the amount of principal money due to the Defendant on his mortgages. Shortly after receiving this account the Plaintiff paid £26 6*s.* 7*d.* to the Defendant.

In June or July, 1879, the Plaintiff received from the Defendant the following account:—

Mr. *S. Cockburn* in account with *Edwards & Son.*

	£	*s.*	*d.*		£	*s.*	*d.*
Balance last account	376	6	7	Cash	26	6	7
Paid *Chapman* mortgage money	450	0	0	1877 Aug. Cash Banks	20	0	0
Interest on £500 from 25th March, 1877, to 1st February, 1878	20	16	8	1878 Feb.	20	0	0
Interest from May, 1877, to May, 1879	25	0	0	,,	630	0	0
Insurance	0	9	0	Nov.	25	0	0
Abstract and conveyance	10	0	0	Balance due	161	5	8
	882	12	3		882	12	3

This account was stated by the Plaintiff to have given him the first intimation he had that the property had been sold.

In March, 1880, the Plaintiff commenced this action, and by his statement of claim, after stating the three mortgages and that the Defendant had acted as the Plaintiff's solicitor, he alleged (par. 7) that shortly after the date of the last mortgage it was arranged between the Plaintiff and Defendant that the latter should receive the rents of the property and apply them in or towards discharge of the interest on the three mortgages, and that the Defendant accordingly received the rents. He went on to allege that he discovered from the last account, and that the fact was, that the Defendant had sold the property without his knowledge. He further alleged that the sale was at an undervalue—that the Defendant had never applied to the Plaintiff for payment of the principal, and that no interest was in arrear when the sale took place. That until after the sale the Plaintiff was not aware of the mortgages containing an unqualified power of sale, and that the omission of the usual qualification of the power of sale was a breach of the Defendant's duty as the Plaintiff's solicitor. The Plaintiff asked for a declaration that the omission of the usual qualification of the power of sale was a breach of the trust reposed by the Plaintiff in the Defendant as his solicitor, and a breach of the Defendant's duty as such solicitor, and for damages and the costs of the action.

There was evidence of a rather vague description that property in *Ramsgate* was rising in value, and that the property if retained would have been worth more than it was sold for; but it was not made out that the sale was at an undervalue. There was a conflict of evidence as to whether it had been explained to the Plaintiff before he executed the mortgages to the Defendant that they contained an unqualified power of sale; but the Court considered it not proved that such explanation had been given.

The action came on for trial before Mr. Justice *Fry* upon oral evidence, and is reported (1).

By the judgment it was declared that the omission by the Defendant from the mortgages of the 26th of March, 1872, and the 7th of November, 1873, of the usual clause or provision qualifying the power of sale therein contained, and the sale by the Defendant of the messuage and premises therein comprised, were respectively breaches of the trust reposed by the Plaintiff in the Defendant, his solicitor, and breaches of the Defendant's duty as such solicitor; and that the Plaintiff was entitled to recover by way of damages in the action the sum of £80 cash, and also the difference between the amount of his costs of the action as between party and party and the amount of his costs as between solicitor and client.

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(1) 16 Ch. D. 393.

Directions were given for taxing of the Plaintiff's costs as between party and party, and as between solicitor and client. The Defendant was ordered to pay to the Plaintiff by way of damages the £80, and the difference between his party and party costs and solicitor and client costs, and to pay to the Plaintiff his taxed costs of the action.

The Defendant appealed.

North, Q.C., and *Bardswell,* for the Appellant:—

We contend that on the evidence it is shewn that the nature of the security was explained to the Plaintiff. But this was not necessary, for there is no settled practice that the power of sale in a second mortgage must be subject to the restrictions which are usual in a first mortgage. Assuming this to be decided against us, still the Plaintiff has suffered no wrong. The interest was more than three months in arrear when the Defendant took possession. He received the rents, but that is not payment of interest by the mortgagor: *Union Bank of London* v. *Ingram* (1); so interest was in arrear more than three months when he sold. If, then, the restrictions contended for had been in the power, the exercise of it would still have been good. The 7th paragraph of the statement of claim is not borne out by the evidence. Then there can be no jurisdiction to give solicitor and client costs of this action, the law saying that party and party costs are the proper costs to be allowed.

Cookson, Q.C., and *R. W. Ingham, contrà*:—

The Judge below, who saw the witnesses, came to the conclusion that the peculiarity in the frame of the mortgage deed was not explained to the client, and the Court of Appeal will not overrule his conclusion on this matter of fact. Then as to the power of sale being unrestricted. The books of precedents shew that this is an unusual form, even in second mortgages. The solicitor, therefore, who made the power unrestricted, without explaining the matter to his client, must be treated as if he had done his duty and introduced the usual restrictions. There was no interest in arrear when the sale took place. When a mortgagee enters

(1) 16 Ch. D. 53.

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into possession, what he receives goes against principal and interest, and is to be treated as payment of principal or interest as the case may be: *Brocklehurst* v. *Jessop* (1). In *Chinnery* v. *Evans* (2) the question was whether a receipt of rents was payment so as to prevent the *Statute of Limitations* from running, and it was held that it was. It is to be presumed that the Defendant appropriated the rents in payment of interest, and the accounts affirmatively shew that it was in fact so appropriated, and that there was no arrear of interest when the sale was effected. The Defendant must make out that if the deed had been rightly framed the Plaintiff would have been obliged to let the property be sold, and this he does not shew. Then as to damages, the costs of sale ought not to be allowed.

[JESSEL, M.R.:—Can you be said to have lost anything if you get as much as you would have got if you had yourself sold the property?]

Yes; the Plaintiff wanted a house at *Ramsgate*, and he suffers loss if his house there is sold and the expenses of sale deducted. Then the evidence shews that there has been a rise in value in *Ramsgate* property.

[JESSEL, M.R.:—I doubt whether it shews more than that some property in *Ramsgate* has risen in value.]

At all events the Court would not direct a new trial because a few pounds have been allowed under this head, there being some evidence of rise in value. Solicitor and client costs have sometimes been given by way of damages: *Anderson's Case* (3).

[JESSEL, M.R.:—The point does not seem to have been argued.]

The report in 50 L. J. (Ch.) 269, shews that it was. When a solicitor uses a client's name without authority, it is the course to make him pay costs as between solicitor and client: *Newbiggin-by-the-Sea Gas Company* v. *Armstrong* (4); *Cape Breton Company* v. *Fenn* (5). The Court has power to punish a solicitor for misconduct by making him pay costs in this way.

(1) 7 Sim. 438, 442.
(2) 11 H. L. C. 115.
(3) 17 Ch. D. 373.
(4) 13 Ch. D. 310.
(5) 17 Ch. D. 198, 210.

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North, in reply.

JESSEL, M.R.:—

The subject-matter of this action is so small that the dispute is substantially only one about costs; but small cases often raise many important points for determination.

The first question is whether the Defendant is liable at all. I am not sure that if I had been the Judge of first instance, I should have held that a case for holding him liable was established by the evidence. There was, however, oral evidence on both sides, and the Judge having seen and heard the witnesses, we ought not in the Court of Appeal to reverse his conclusions of fact. His conclusions were, that the power of sale was in an unusual form, and that the Plaintiff, when he executed the mortgage deed, was not aware that the power of sale was in the form in which it was. If these conclusions of fact are correct, then the Defendant, who was the Plaintiff's solicitor in the mortgage transaction, was guilty of a breach of duty. If a man acts in a fiduciary position towards another in a matter in which he himself has a personal interest, he is liable to be called upon to account as to the discharge of his fiduciary duties. The Defendant, therefore, in the present case, is bound to shew that he explained to his client, the Plaintiff, the nature of the power of sale, supposing it to be in an unusual form. He was bound to take care that his client had the same protection as if he had employed an independent solicitor. A solicitor who lends money on mortgage to his client on any but strictly usual terms, would be wise if he always required the intervention of another solicitor. If that is not done, he must preserve evidence that the circumstances were explained to the client. If, then, the power of sale was in an unusual form, the Defendant must be held to have done wrong. Was the power, then, in an unusual form? I feel doubt on that point. I am not sure that it is the practice to insert as a matter of course in a power of sale in a second mortgage the same qualifications as those which are usual in a power of sale in a first mortgage. But we have no evidence before us that there is a settled practice to the contrary. The precedents are so few that they do not throw much light on the question, which is not to be

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wondered at, since counsel always warn lenders against advancing money on a second mortgage. I think there is reason to believe that it is common to insert a more stringent power of sale in a second mortgage, but in the absence of any evidence that there is a settled practice to that effect, we cannot decide that it was right to insert any other than the common power of sale, without any explanation to the client. Now, the common form contains a provision that the power of sale shall not be exercised unless one or other of two conditions is satisfied, viz., that there shall be six months' default in payment after notice, or that some interest shall be three months in arrear. That clause was not inserted, and the Defendant sold without notice. The sale then was improper unless there was interest three months in arrear, and I think that there is great weight in the argument for the Respondent, that it was improper whether there was interest in arrear or not, for that the client had a right to be informed what the terms were upon which the estate could be sold, and that the absence of such information made the sale improper. I am disposed to think that this argument ought to prevail. But was there any interest in arrear? It has been argued that a mortgagee in possession, if he receives rents to an amount more than sufficient to pay the interest, must be taken to have been paid his interest. I cannot accede to that argument. A mortgagee in possession first deducts expenses, and then what remains goes against principal and interest; but till an account is taken there is no set-off, there is no appropriation of the rents. This is still clearer if you take the case of a horse. The mortgagee lets it out for hire, he has to pay the expenses of its keep, and you cannot treat his receipts as appropriated to anything till an account is rendered. I should not have dwelt on this point had it not been contended that two cases decide the contrary. One of these is *Brocklehurst* v. *Jessop* (1). As to this case, I have to remark, first, that what is relied on is a mere *dictum*; secondly, that, had it been a decision, it would not have been binding on the Court of Appeal; and thirdly, that the *dictum* is wrong, a contrary doctrine being laid down in *Chinnery* v. *Evans* (2). In *Brocklehurst* v. *Jessop* an equitable mortgagee was in possession, the mortgagor was dead, and the plaintiffs, the mortgagees, sought to have a sale and to prove for the deficiency against the general assets. The Vice-Chancellor said (1), "In this case it has been said that the remedy of the plaintiffs as general creditors, if they ever had any, has been barred by the *Statute of Limitations,* and that the receipt of rent by them is not a payment within the meaning of the proviso in that statute. But my opinion is, that, if an equitable mortgagee enters into possession of an estate and receives the rents of it, such receipt ought *primâ facie* to be taken as payment either of the principal or interest of his debt, as the case may be. In order, then, to determine whether the plaintiffs are entitled to stand in the situation of creditors independently of their right as mortgagees, it is necessary that the circumstances under which they took possession should be ascertained, and more especially as one of the defendants is an infant, and some of the other defendants do not explicitly admit the fact. The proper course, therefore, is to direct an inquiry as to the taking possession and receipt of rents, and if it should turn out that the plaintiffs' debt is preserved, so as to make them creditors on the general assets of the intestate, they may apply to amend their bill by making it a bill on behalf of themselves and the other creditors." The observation that receipt of rents is *primâ facie* payment is a mere *dictum,* and it does not appear that any application to amend the bill was made, or any relief granted on the footing of the *dictum.* If the *dictum* was correct, it would follow that the mortgagee still had the rights of a general creditor. But the receipt of rents by the mortgagee is not a payment by the mortgagor, or by any one on his behalf. The mortgagee receives rents which are his own, subject, of course, to the right of redemption; he is not receiving interest or principal, but receiving the rents of property which belongs to him subject to the right of the mortgagor to redeem it. The case of *Chinnery* v. *Evans* (2) shews that the *dictum* is wrong. The case there arose under the *Statute of Limitations,* 3 & 4 Will. 4, c. 27, and the first question to be decided was whether a payment, in order to take a case out of the statute, must be made by the party chargeable, or his agent, and it was held that it must. Then arose the question whether the payments in that case were so made. The payments were made by a

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(1) 7 Sim. 438.

(2) 11 H. L. C. 115. 10 Jur NS
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(1) 7 Sim. 442.

(2) 11 H. L. C. 115. 10 Jur NS 855

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receiver, who, no doubt, had been appointed at the instance of the mortgagee, and the question was whether such payments were made by or on behalf of the mortgagor. The whole contest was whose agent the receiver must be treated as being, and it was held that he must be treated as the agent of the mortgagor. Lord *Westbury* says (1), "The next point raised in argument was this, whether payment made by the receiver appointed under the statute can be considered as payment made by the person liable to pay, or his agent. . . . Upon that point I think no reasonable doubt can be entertained, that under the statute the receiver in the receipt of the rents of the *Limerick* estate is, in point of fact as well as of law, the receiver of the mortgagor, the owner of the estate subject to the mortgage, and that any payment made by the receiver in pursuance of the order is payment in law by the legal agent of the person liable to pay." Lord *Cranworth* says (2), "The payments in this case were not payments by a stranger, for though a receiver appointed under the Irish statute, 11 & 12 Geo. 3, c. 10, is an officer of the Court, yet he is certainly no stranger to the mortgagor, but a person paying for him and on his account what he is bound to pay." The payments, therefore, were payments made by an agent of the mortgagor. The decision is that payments, in order to take a case out of the statute, must be so made, and that negatives the view that receipt of rents by a mortgagee is to be treated as payment.

But another ground is taken by the Respondent. Rents received by a mortgagee may by agreement be appropriated, and though, if no account is sent in, the mortgagee may wait to the end before making any appropriation, yet, if he settles an account in the meantime, he is bound by that account; and it is argued that here there was a settlement by which the interest was treated as paid up to a certain time. I think this argument well founded. The accounts rendered by the mortgagee appear to proceed on the footing that the rents were to be set off against interest, and the final account treats the interest as having, shortly after March, 1877, been satisfied down to the 25th of that month, and if the same arrangement was carried on, which the mortgagor, in the absence of any notice to the contrary, had a right to assume that

(1) 11 H. L. C. 134. 10 Jur ns. 854

(2) 11 H. L. C. 139. 10 Jur ns 857

it would be, no interest was three months in arrear when the sale took place. Now the statement of claim alleges an agreement that the Defendant should receive the rents of the property and apply them in payment of the interest on the mortgages. I think that the accounts furnish evidence that there was such an agreement, and that the rents were set off against the interest. I think, therefore, looking at the whole of the circumstances, that it must be considered that at the time of the sale there was not any interest in arrear for three months.

The sale, then, being held to have been improper, to what damages ought the Plaintiff to be held entitled. With deference to Mr. Justice *Fry*, I think that he has unnecessarily embarrassed himself, and has to some extent embarrassed me by going into details. When sitting as both Judge and jury, I think that he might have assumed the privileges of the latter body, and found a sum as damages without shewing how he arrived at it. But as he has given his reasons, we must consider them. (1.) As to the costs of the conveyance, £10 has been charged, but the Defendant acted as solicitor for the purchaser as well as for himself. The Plaintiff, therefore, cannot claim the whole of that sum, but he must have part of it. (2.) As to the expenses of reinvestment, I am wholly unable to follow Mr. Justice *Fry's* reasoning. The Plaintiff had no £630 to invest, nor anything like it. He could not, under the most advantageous circumstances, have anything more than a small balance after paying off the mortgages. (3) As to the rise in value of property in *Ramsgate*, I should have allowed the Plaintiff nothing if I had been the Judge of first instance, for the evidence appears to me too vague to be relied on; but, sitting here as a Judge of Appeal, I cannot overrule the decision of Mr. Justice *Fry* that the Plaintiff is entitled to something under this head. (4.) The most important point is as to the costs as between solicitor and client. I am of opinion that it is not according to law to give to a party by way of damages the costs as between solicitor and client of the litigation in which the damages are recovered. The law gives a successful litigant his costs as between party and party, and he cannot be said to sustain damage by not getting them as between solicitor and client. I have conferred with my colleagues as to the damages, and we agree to fix them at £10.

As regards costs, it is plain that the important issue in the action was whether the property was not sold at an undervalue, and that we should never have heard of this action had it not since been resold at an advance in price. This issue has been found in favour of the Defendant, and he ought to have his costs of it, which will be set off against the Plaintiff's general costs of the action. There will be no order as to the costs of the appeal.

BRETT, L.J.:—

The Plaintiff has framed his action as an action of tort, and to succeed he must shew that the Defendant has done a wrongful act, and that he has sustained damage from it.

The first question, then, is whether the Defendant has been guilty of a wrongful act. The case belongs to a class of transactions which have more than once been before us of late, a lending by a solicitor to his client on a second mortgage. Here another client of the solicitor advanced part of the money required by the Plaintiff on a first mortgage, the Defendant advanced the rest on a second mortgage. Thus the solicitor virtually had control over both securities—a state of things likely to lead to oppression, and which the Court ought to discourage. A solicitor would act more wisely if he did not lend money at all to his client, it not being any part of a solicitor's business to lend money; but if he does so, he ought not to let the conveyancing connected with the mortgage be transacted in his own office. Still, if he can shew that he has done nothing to which an independent solicitor employed by the mortgagor would not, as a matter of course, have assented, or that he has fully explained the matter to the mortgagor, the law cannot interfere with the transaction. Here the Defendant has not satisfied either of those conditions. He has drawn the mortgage in a form to which an independent solicitor employed by the mortgagor would have objected, and he has not explained the peculiarity to his client. In my opinion, therefore, the Defendant was guilty of a breach of duty to the Plaintiff.

It is not enough, however, that there was a wrongful act, the Plaintiff must shew that he has sustained damage. If an action had been brought for breach of duty, that would have been an action on contract, there being a contract between a solicitor and his client; the present action is not founded on contract, but on a wrongful sale; the breach of contract being introduced only for the purpose of shewing the sale to be wrongful, it is therefore necessary to prove damage. It has been urged that there is no damage because interest was in arrear for three months, so that if the power had been in the ordinary form the property might have been sold. But was there any interest in arrear? The argument on behalf of the mortgagee went so far as this, that when a mortgagee is in possession there must be interest in arrear, unless an actual appropriation of the rents to payment of interest has been made. It is not necessary to decide that point, for we have here accounts which shew actual appropriation. The last account rendered shews that in the view of the mortgagee interest had been paid up to the 25th of March, 1877, and that the whole principal remained due. This shews that the rents must have gone in payment of interest, and if the interest was paid up to the 25th of March, 1877, there cannot have been any interest in arrear for three months when that sale took place. If, therefore, the power of sale had been in the proper form, the Defendant would not have been entitled to sell under it.

What, then, is the amount of damage? If the power had not been exercised, the Plaintiff might either have kept the house or sold it. If his only way of selling it would have been to sell through a solicitor with a regular investigation of title, I do not think that the Plaintiff could have recovered damages in respect of the expenses of sale. But he might have sold to some one who would have taken the title without investigation, and I think, therefore, that some allowance should be made to him in respect of the costs of sale which have been deducted.

As regards increase of value, I think that there was evidence on which the Judge might properly rely, that the value of property in *Ramsgate*, including this property, was increasing, and I should not have been disposed to interfere with any conclusion at which the Judge arrived as to the amount to be allowed to the Plaintiff in respect of such increase, but we do not know how much the Judge attributed to this head of damage.

As to the costs of effecting a new investment, I think that nothing can be allowed. The Plaintiff never could have had

£620, or anything near that sum, to invest, for he must have paid off his mortgages.

As to the extra costs, the damages in an action of tort must have been incurred when the action is brought, except in some cases where they include everything up to the time of trial, and they cannot include any expenses incurred in the action itself. The law considers the extra costs which are disallowed on taxation between party and party as a luxury for which the other party ought in no case to be liable, and they cannot be allowed by way of damages.

COTTON, L.J.:—

This is an action to recover damages for an alleged wrongful sale. One ground of complaint was that the sale was at an undervalue, but on this the Plaintiff has failed. The other branch of the case involves questions of greater difficulty. The Plaintiff alleges that the sale was improper because it was made under a power which authorized a sale at any time unconditionally, and such an unconditional power of sale he contends ought not to have been inserted. In my opinion a solicitor who lends money to a client, and acts for the client as well as for himself in the matter of the loan, takes a position of great responsibility; he takes upon himself the burden of having to prove that he fully advised his client as to everything that is unusual in the terms of the bargain. We have no materials before us which would enable us to decide that there is any settled rule that a power of sale in a second or third mortgage is not to be made subject to the conditions which are usual in a power of sale in a first mortgage, and that usual form of power imposes the condition that six months' notice must have been given or some interest be three months in arrear before the power is exercised. It is incumbent on the solicitor to satisfy the Court that he called the attention of the client to the fact that this power of sale was not in the usual form, and gave him such advice as an independent solicitor would have given him. The Judge who tried the case, and heard and saw the witnesses, came to the conclusion that the solicitor did not establish that he had done so, and we cannot overrule his conclusion as to this matter of fact.

This being so, we must come to the conclusion that the sale was improper unless six months' notice was given or interest was three months in arrear. It is clear that notice was not given, but interest was in arrear unless the rent received by the Defendant can be treated as applied in payment of interest. Now, receipt of rents by a mortgagee is not, as a general rule, equivalent to a payment by the mortgagor. If a mortgagee enters into possession, his receipt of rents is not payment of interest by the mortgagor so as to entitle the latter to the benefit of a proviso for reduction of interest on punctual payment; and I quite agree with the remarks of the Master of the Rolls as to the *dictum* in *Brocklehurst* v. *Jessop* (1). If, however, a mortgagee receives rents which are all along more than sufficient for payment of interest and expenses, so that his account, if he were to render one, would shew that there was in his hands at every time a balance applicable to reduction of the principal, I am not prepared to decide that he can merely, because there has been no actual appropriation of the rents to payment of interest, say that there is interest in arrear within the meaning of the proviso in the power of sale. It is not, however, necessary to determine that question in the present case, for the accounts rendered by the mortgagee treat the rents as applied in payment of interest, and, that having gone on for several years, I think it must be taken as established that there was an arrangement that the rents should be so applied; and, this being so, the accounts shew that there was not any interest in arrear for three months when the sale was effected.

The sale, then, was wrongful; but there arises a great difficulty as to the amount of damages, and it is necessary for us to give our opinion on some of the heads. It is not for us to examine into the quantum of damages where a Judge simply assesses the damages at a certain sum, but when he gives his reasons we must examine them as we should the charge of a Judge to a jury as to the principle on which they were to estimate damages. Now, first, I am of opinion that the difference between solicitor and client costs and party and party costs in an action cannot be given by way of damages in the same action, the latter costs being all that the Plaintiff is entitled to. Costs in another action stand on quite a

(1) 7 Sim. 442.

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different footing. Then, as to expenses of reinvestment, nothing can be given, there being no £620 to reinvest, as it is absorbed by the mortgages, and there is no evidence that the mortgagor was in a position to pay off the mortgages and keep the property. As to the increase of value in property in the neighbourhood, I doubt whether there is a ground for damages, since I see no evidence that the Plaintiff could have kept the house so as to get the benefit of the increase in value; but on this point I am unwilling to differ from the Judge below who heard the witnesses. If I had to decide this case in the first instance I should think a very small coin enough for the Plaintiff to recover, but I do not differ from the rest of the Court in the conclusion at which they have arrived on this appeal.

Solicitors for Plaintiff: *Van Sandau & Cumming.*
Solicitors for Defendant: *F. Venn & Son.*

H. C. J.

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May 2.
C. A.
July 7, 8.

Ex parte BARROW. *In re* ANDREWS.

Composition Resolutions—Validity of subsequent Agreement by Debtor to pay one Creditor in Full—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 126.

After composition resolutions under sect. 126 of the *Bankruptcy Act*, 1869, have been passed and registered, the debtor cannot, before the completion of the composition in accordance with the resolutions, enter into a valid agreement with one of the creditors who is bound by the resolutions, to pay him his debt in full, even though the creditor agrees at the same time to give the debtor fresh credit.

Such an agreement would be inconsistent with good faith to the other creditors, and with the spirit of sect. 126.

The debtor does not stand in the same position as a discharged bankrupt until the composition has been fully paid.

Jakeman v. *Cook* (1) distinguished, on the ground that there the debtor had obtained his discharge in a liquidation by arrangement.

ALFRED ANDREWS, a bootmaker at *Northampton*, on the 2nd of April, 1879, filed a liquidation petition in the *Northampton* County Court. The creditors resolved by the proper statutory majority to accept a composition of 5*s.* in the pound in satisfaction

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(1) 4 Ex. D. 26.

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of their debts, to be paid in three instalments of 2*s.*, 1*s.* 6*d.*, and 1*s.* 6*d.*, respectively, at two, four, and six months from the date of the registration of the resolutions. The resolutions were registered on the 9th of July, 1879. *James Barrow*, a leather merchant in *Bermondsey*, a creditor in respect of £187 7*s.* 9*d.*, was one of the creditors who were bound by the resolutions. In August, 1879, before the first instalment of the composition became due, an arrangement was entered into between him and the debtor that his debt should be paid in full and that he should continue to supply the debtor with goods on credit. He received the first instalment of the composition in September, 1879, but it was in dispute whether the other instalments were paid to him when they became due. The Court of Appeal, however, were of opinion upon the evidence that, if the second and third instalments were not paid to *Barrow* when they became due, he had dispensed with the punctual payment, and that he could not be heard to say that the original debt had revived by reason of default on the part of the debtor. On the 10th of May, 1880, the debtor accepted in favour of *Barrow* three bills of exchange for the unpaid balance of the original debt.

The Court of Appeal were of opinion that these bills were given in pursuance of the agreement made in August, 1879, that *Barrow* should be paid in full. After this *Andrews* filed a second liquidation petition, and *Barrow* claimed to prove in the liquidation for the amount of the three bills. *Andrews* had been convicted of a criminal offence, and was in prison. The trustee rejected the proof, and his decision was affirmed by the Judge of the County Court. *Barrow* appealed to the Chief Judge. The appeal was heard on the 2nd of May, 1881.

E. Cooper Willis, for the Appellant:—

The proof ought to have been admitted.

In *In re Hatton* (1) a creditor who had failed to get an instalment of his composition paid, was held entitled to bring an action against the debtor for the whole unpaid balance of his original debt.

Jakeman v. *Cook* (2) is precisely in point. As Chief Baron

(1) Law Rep. 7 Ch. 723.

(2) 4 Ex. D. 26.

Kelly there said (1), so here: "There is nothing in sect. 49 of the *Bankruptcy Act* of 1869 to prevent such a contract being enforced."

Bigham, for the Respondent:—

The question is one of fact simply. There is no question of law involved; and the authorities are not disputed.

Willis, in reply.

BACON, C.J.:—

The case, as presented to the Court, is full of suspicion.

Whilst fully admitting the principle upon which *Jakeman* v. *Cook* (2) was decided, I think it has no application to the present case. That case decides that a contract may be valid whereby a man, who has obtained an order of discharge, agrees, for a new and valuable consideration, to pay a debt which has been released by the discharge. There a man, in consideration of having the necessaries of life supplied to him by a butcher on credit, agreed to pay an old account.

Here there has been a meeting of creditors, and a composition has been agreed upon. Resolutions have been passed to free the debtor from his liabilities on the payment of a composition of 5*s*. in the pound. To that agreement the Appellant was a party. The Appellant also received the first instalment of the composition, and there is a receipt by him shewing that he took bills for the two other instalments. But his case is, that, notwithstanding all this, there was an agreement between him and the debtor, that if he (the Appellant) would give the debtor credit for further goods, the debtor would give him bills for the former debt. Of this there is no evidence beyond the statement of the Appellant himself, who offers no explanation of his having taken the bills The Appellant's assertion is not sufficient in itself to support his case, and the debtor, being in prison under the sentence of a criminal Court, has not been called to give evidence. The case is not established; and, moreover, it is full of suspicion.

I think the County Court Judge was right in refusing upon such evidence, and in such a state of facts, to admit a proof in respect of these bills, and I dismiss the appeal, with costs here and below.

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(1) 4 Ex. D. 29.

(2) 4 Ex. D. 26.

From this decision *Barrow* appealed. The appeal was heard on the 7th of July, 1881.

E. Cooper Willis, for the Appellant:—

The case is governed by *Jakeman* v. *Cook* (1), in which it was held by the Exchequer Division that an agreement by a liquidating debtor, who had obtained his discharge, to pay one of his creditors in full, the creditor (who was a butcher) agreeing to continue supplying him with meat, was a valid agreement, and would support an action. Though the present case is one of composition, the principle is the same. Moreover, the evidence shews that the debtor had made default in paying the instalments of the composition.

Bigham and *H. W. Andrew,* for the Respondent:—

Such an agreement entered into before the time has arrived for the payment of the instalments of the composition is void as a fraud on the bankruptcy law, for the effect of it would be to deprive the debtor of the means of paying the composition. The composition arrangement is entered into between the debtor, the general body of the creditors, and the particular creditor; two of the parties cannot alter it in the absence of the other, even though the creditor has given value to the debtor for it. The evidence does not prove any default by the debtor in paying the composition. *Jakeman* v. *Cook* is distinguishable, because there the debtor had obtained his discharge in a liquidation by arrangement, and all his property had been given up to his creditors. Here the debtor's assets are the fund for the payment of the composition, and an agreement which might prevent him from paying it cannot be valid.

Willis, in reply:—

The composition resolutions are not more binding on the Appellant than an accord and satisfaction; why should he not afterwards be entitled to receive any money the debtor offers? There is no fraud, and he gave value for the agreement. If the agreement had been made before the passing of the resolutions it probably would have been a fraud on the other creditors. At any time after the resolutions are passed the debtor can, by making default in paying the composition to a particular creditor, give him the right to sue for the whole of his original debt. The creditors have no lien for the composition on the assets; they are the absolute property of the debtor after the resolutions are registered, and he can deal with them as he pleases: *Ex parte Burrell* (1).

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(1) 4 Ex. D. 26.

July 8. LORD SELBORNE, L.C.:—

This is a question as to a proof which has been tendered in the bankruptcy and rejected by the trustee. The creditor who tendered it was a party to resolutions for composition which were passed by the creditors in April, 1879, and were registered on the 9th of July, 1879, and under which a composition of 5*s.* in the pound on their debts then existing was to be paid in certain instalments to the creditors who were bound by the resolutions in satisfaction of their debts. The Appellant was one of the creditors who was bound. He was a creditor of the bankrupt at that time for £187 7*s.* 9*d.* What was the nature of that proceeding? It was a statutory composition under sect. 126 of the Act, and the material provisions of that section, as bearing upon the principles on which the present case must be decided, are these. If at two successive meetings there are certain majorities in number and value of the creditors present in favour of a composition which is proposed, it is made absolutely binding, not only on the creditors who assented to it, but on those who dissented, provided that their names and addresses and the amounts of the debts due to them are inserted in the statement of his affairs produced by the debtor at the meetings. Again, by the express words of the section, such a composition so accepted is to be in satisfaction of the debts due to the creditors. It is to be binding on all the creditors whose names, addresses, and debts are mentioned in the debtor's statement, and its provisions are not to be added to or varied except by an extraordinary resolution of the creditors

(1) 1 Ch. D. 537.

passed subsequently. The present claim is to prove in the subsequent liquidation of the debtor in respect of bills of exchange which were given by him to the creditor in May, 1880, avowedly for the agreed balance of the debt of £187 7*s.* 9*d.*, after allowing for the instalments of the composition. The first instalment of the composition had been received by the Appellant in the previous September. Bills given for a debt which is satisfied by the bankruptcy law are *primâ facie* given without any consideration. If it were necessary to cite any authorities for that proposition the cases of *Jones* v. *Phelps* (1) and *Heather* v. *Webb* (2) clearly establish it. But it is said that when the bills were given the Appellant's original debt had revived, because the terms of the composition arrangement had not been fulfilled by the debtor. Whether it is meant that the non-fulfilment consisted in the non-delivery of the promissory notes for the instalments, or in the non-payment of the instalments when they became due, is by no means clear. The question, which is one partly of law and partly of fact, is whether there had, in any such sense as would have the effect of reviving the original debt, been any default on the part of the debtor towards this particular creditor. The County Court Judge and the Chief Judge both thought that there was not sufficient evidence to satisfy them that there had been any such default. They considered that the admitted fact that the bills were taken for a debt which was satisfied by the composition, if there was no default in payment on the part of the debtor, threw on the creditor the *onus* of proving that there had been such a default by the debtor as would revive the original debt. I quite agree with them that the Appellant did not satisfactorily discharge this *onus*. [His Lordship referred to the evidence, coming to the conclusion that there had been no such default as could have the effect of reviving the original debt, and that the bills of May, 1880, were given by the debtor to *Barrow* in consequence and on the footing of the agreement of August, 1879, that his debt should be paid in full, and continued:—] Some part of the argument was addressed to this hypothesis, and the case of *Jakeman* v. *Cook* (3) was referred to as shewing that in a case, not of composition, but of liquidation by arrangement, after a debtor has obtained his discharge he is at liberty to enter into a new contract with one of his creditors to pay him his original debt in full. That case appears to me to have no bearing whatever on the present case. The present case is that of a statutory composition under sect. 126, and the agreement of August, 1879, was made, not only before the statutory composition was exhausted by the fulfilment of its terms, but even before the first instalment of the composition had become due to the creditors who were bound by it. It may well be that after a composition has been fully and finally worked out, and all the instalments of it have been paid, the position of the debtor is the same as that of a debtor who has obtained his discharge in a bankruptcy or a liquidation by arrangement, and that an agreement by him with one of the creditors, such as that which was made in *Jakeman* v. *Cook* (1), may be supported. But in the present case everything was done before any of the instalments of the composition had become payable to any of the creditors. By sect. 126 it is expressly provided that no addition to or variation in the composition is to be made except by an extraordinary resolution of the creditors. If there can be no addition or alteration for the benefit of all the creditors without such a resolution, how can there be an addition or alteration for the benefit of one creditor, and that behind the backs of the others and without any communication to them? It appears to me impossible that a composition like this for the benefit of all the creditors, and such an agreement for the benefit of a particular creditor can stand together. I am confirmed in this view by a consideration of the consequences which would result from the contrary conclusion. The validity of the agreement cannot depend on the quantum of the debt. If an agreement with a particular creditor that he shall be paid in full, provided he goes on dealing with the debtor on credit, be valid in the present case, it must be equally valid if the debt due to the creditor was a very large one, and the composition had been forced on the other creditors by reason of the value of his debt, and by his vote alone, and if an agreement made at such a time and under such circumstances could be supported, I do not see what there is to prevent the money being paid down before any of the instalments of the composition had been paid to the other creditors, and thus the whole body of the debtor's assets might be swept away by the one creditor. I am confirmed in my conclusion by the view taken by the Court of Appeal in *Ex parte Sydney* (1), a case which, though not similar in its circumstances to the present case, depended on similar principles. I must add that there have been many decisions both in Courts of Law and in Courts of Equity against the validity of underhand dealings in favour of a particular creditor contemporaneously with a composition for the benefit of the general body of the creditors, and it appears to me that the principles of those decisions are fully and entirely applicable to the present case. But it is said that fresh credit was given by the Appellant to the debtor, and that in this way there was a consideration for the agreement to pay the old debt in full. That might well be so in a case like *Jakeman* v. *Cook* (2), where there was no question of good faith with the other creditors, and no question of compliance or non-compliance with the terms of composition resolutions. But no consideration can support an agreement which is inconsistent with good faith to the other creditors, and with the spirit of sect. 126. The appeal must be dismissed with costs.

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(1) 20 W. R. 92.

(2) 2 C. P. D. 1.

(3) 4 Ex. D. 26.

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(1) 4 Ex. D. 26.

BRETT and COTTON, L.JJ., concurred.

Solicitor for Appellant: *H. Montagu.*
Solicitor for Respondent: *C. C. Becke, Northampton.*

(1) Law Rep. 10 Ch. 208.

(2) 4 Ex. D. 26.

W. L. C.

C. A.
1881
Aug. 2.

In re SILVER VALLEY MINES.

Company—Business never commenced—Winding-up—Jurisdiction of High Court—Stannaries Court—Companies Act, 1862, *ss.* 81, 116.

The words "engaged in working" mines in the 81st section of the *Companies Act*, 1862, mean "is or has been engaged in working," or "now or formerly engaged in working" mines in *Cornwall*, and do not apply to a case where the company, although they have purchased a mine in *Cornwall*, have not begun to work it.

Where, therefore, a company was formed to purchase mines in "*Cornwall* or elsewhere in *England*," and contracted to purchase a right to have a lease of a mine in *Cornwall*, but never acquired the lease or began to work the mine:—

Held, that the High Court of Chancery had jurisdiction to make a winding-up order.

Re East Botallack Consolidated Mining Company (1) disapproved of.

ON the 25th of April, 1881, the above company was incorporated under the provisions of the Companies Acts, 1862 to 1880, with a nominal capital of £75,000, divided into shares of £1 each, with the object, amongst others, of purchasing and otherwise acquiring "mines and mineral properties in *Cornwall* or elsewhere in *England*." The registered office of the company was in *London*.

The promoter of the company was a Mr. *Reynolds*, who acquired through his nominee, *W. Henrys*, the right to have a lease granted within six weeks from the 13th of April, 1881, of certain property in *Cornwall* called the *Silver Valley Lead and Pyrites Mines* for twenty-one years, without the payment of any premium therefor.

On the 26th of April, 1881, a provisional agreement was entered into between the said *W. Henrys*, as nominee of *Reynolds*, of the one part, and *W. Harrison* of the other part, whereby *W. Henrys* agreed to sell to the company the right of the said *W. Henrys* to have the said lease and the plant on the property for the sum of £50,000.

In the month of May, 1881, the company, through their directors and *Reynolds*, issued a prospectus of the company to the public, referring to the said agreement and recommending its adoption, and the purchase of the mine as a very profitable and valuable concern.

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(1) 34 Beav. 82. 10 Jur NS. 1193

In July, 1881, a shareholder presented a petition in the Chancery Division of the High Court before Vice-Chancellor *Hall*, alleging that the prospectus was false and fraudulent, and that the company had never commenced to carry on business, and asking for a compulsory winding-up order, the appointment of a provisional liquidator, and other relief.

On the 30th of July, Vice-Chancellor *Hall*, on the application of the Petitioner, appointed a provisional liquidator, the hearing of the petition standing over to the 17th of August.

On the same 30th of July a creditor's petition for the winding-up of the company was presented in the Stannaries Court.

Certain creditors and shareholders appealed from the order of the 30th of July, on the ground that, under sect. 81 of the *Companies Act*, 1862, the Vice-Chancellor had no jurisdiction to make it, and by special leave of the Court of Appeal the appeal was heard on the 2nd of August.

Higgins, Q.C., and *Grosvenor Woods*, for the Appellants :—

Under sect. 81 of the *Companies Act*, 1862, the proper forum for the winding-up of this company is the Stannaries Court. At all events, that Court has jurisdiction, and there is no ground for ousting it.

[COTTON, L.J. :—The 81st section says that the Stannaries Court shall have jurisdiction in the case of a company "engaged in working" a mine in *Cornwall*. This company is not necessarily formed for working mines in *Cornwall*, for the memorandum of association says "in *Cornwall* or elsewhere in *England*." Where is the company engaged in working mines ?]

We say in *Cornwall*. The case is on all-fours with *In re East Botallack Consolidated Mining Company* (1), where the company was formed to purchase mines in *Cornwall*, but never possessed or worked a mine there, and never commenced business, and it was held that the Stannaries Court had jurisdiction to make a winding-up order. And the jurisdiction of that Court is not ousted by

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(1) 34 Beav. 82.

10 Jan [illegible] 83

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the fact that some of the objects of the company are to be carried out beyond its district: *In re Penhale and Lomax, &c., Company* (1). The words in the statute cannot mean "actually engaged in working," it is sufficient if preliminary steps to working have been taken. If it be a question of evidence, we are told that the company have acquired a lease of a mine in *Cornwall* and are working it.

[*E. Ford* (*Leverson* with him), for the company:—I am instructed that the company have not got a lease but only a right to a lease, and have not commenced business.]

"Commencing business" is an ambiguous phrase, and may mean that no ore has been sold, but it may include the sinking of shafts and the preparation of works preparatory to mining operations.

E. Ford and *Leverson*, for the company; and

Hastings, Q.C., and *Beddall*, for the provisional liquidator, were not called upon.

JESSEL, M.R.:—

This is an application by way of appeal to discharge an interlocutory order made by the Vice-Chancellor *Hall*, appointing a provisional liquidator of the *Silver Valley Mines, Limited*, on the ground that he had no jurisdiction to make it. The order was made on a petition which on the face of it shews a case for the jurisdiction of the High Court; therefore those who allege a want of jurisdiction must be prepared with evidence to prove that there was none. Now, it is alleged that the case is within the 81st section of the *Companies Act*, 1862, which says that the Stannaries Court shall have jurisdiction to wind up "in the case of a company engaged in working any mine within and subject to the jurisdiction of the Stannaries." It appears to me that those are tolerably plain words. The words "engaged in working" mean what they say. But it is said if those words are read literally, then a company that has been working but has stopped working cannot be wound up in the Stannaries Court. But those

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(1) Law Rep. 2 Ch. 398.

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words refer to the past as well as to the present, and mean a company that is or has been engaged in working mines in *Cornwall*. The reason for that is plain, for when a company which has been actually working a mine in *Cornwall* is wound up, there would naturally arise local claims of tradesmen and workmen which would be more satisfactorily dealt with by a local court. But that reason does not apply to a case where no mine has been acquired at all, or where, the company having a mine, it has not been worked. Now the company in this case was not really formed for the purpose of working mines in *Cornwall*, but for acquiring and working mines "in *Cornwall* and elsewhere in *England*," and it might, consistently with its memorandum of association, have a mine in *Derbyshire* and not in *Cornwall*. It is true that the prospectus shews they contemplated purchasing a mine in *Cornwall*, but they are not limited to that. It appears to me that the case of *Re East Botallack Consolidated Mining Company* (1), which was before Lord *Romilly*, is not exactly in point. There the company was formed to purchase and work a mine in *Cornwall* only. But as it has been cited and relied on, I think it right to say that, in my opinion, it was not well decided, because a company formed to purchase a mine in *Cornwall* is not a company "engaged in working" a mine there. In the present case there is no evidence that the company had a mine in *Cornwall*, or was ever engaged in working a mine in *Cornwall*. Therefore a person who without such evidence asks the Court to assume that the company has a mine in *Cornwall*, must necessarily fail in his application. But it may turn out hereafter that the company has a mine in *Cornwall*. It may be better, therefore, to state in our order that it is made without prejudice to any subsequent application which may be made if such should turn out the case.

Brett, L.J.:—

It seems to me that the very foundation of this application rests upon the assumption that the case of *Re East Botallack Consolidated Mining Company* was rightly decided. Now it seems to me that the late Master of the Rolls in that case was persuaded to hold that the words "engaged in working" meant "formed for

(2) 34 Beav. 82. 10 Jur N S 1193

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VALLEY
MINES.

the purpose of working." But we have no right to treat the words of an Act of Parliament in that manner. That objection strikes at the root of the argument in that case. Therefore a person who comes here alleging that a company is engaged in working a mine within the jurisdiction of the Stannaries Court is bound to prove that fact. The present Appellant has failed to produce any such evidence. His appeal therefore wholly fails.

COTTON, L.J.:—

I am of the same opinion. Of course those who come here alleging that the High Court has no jurisdiction have the burden thrown on them of proving that fact. The question here is, is this a company engaged in working a mine in *Cornwall* within the meaning of the 81st section of the *Companies Act*, 1862? Now, on looking at the memorandum and articles of association, one cannot say this company was formed to work mines in *Cornwall*. The objects stated in both are general. The guiding words are "in *Cornwall* or elsewhere in *England*." It is therefore impossible to say that this company was formed to purchase and work a mine in *Cornwall*. But further, in my opinion it would be wrong to hold the words "engaged in working" in the 81st section to mean "formed for the purpose of working." Those words, in my opinion, mean "now or formerly engaged in working" a mine. It is said that this is so here; but no evidence has been adduced in support of that assertion. The petition only alleges that some one on behalf of the company has contracted to purchase the right to have a lease of a particular mine in *Cornwall*. It would be wrong therefore, in my opinion, to assume that this company has or was engaged in working a mine in *Cornwall*. It may turn out to be so hereafter, but our order is without prejudice to any application that may hereafter be made on that ground. I think I should add that *Re East Botallack Consolidated Mining Company* (1) is not an authority in support of this appeal, and was wrongly decided.

Solicitors: *Snell & Greenip; James Davis; E. Beall & Co.*

M. W.

10 Jur 5/1/93

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(1) 34 Beav. 82.

PARKER *v.* WELLS.

[1881 P. 26.]

C. A.
1881
July 13.

Discovery—Denial of Plaintiff's Title—Rules of Court, 1875, *Order* XXXI., *rr.* 5, 19—*Answer to Interrogatories.*

10 QBD 168
— 463.

Where a defendant's answering an interrogatory cannot help the plaintiff to obtain a decree, but will only be of use to him if he obtains a decree, the Court has a discretion whether to oblige the defendant to answer it before trial, and will not do so where compelling such discovery would be oppressive.

The Plaintiff alleged that *G.* had deposited money with the Defendant *E.* in trust for *S.* and *A.* (both since deceased) successively for their lives, and then for the Plaintiff and another person absolutely. That *E.* had employed it in trade and made large profits, and had paid the interest to *S.* and *A.* for their lives, but now refused to pay over the principal. *E.*, by his defence, admitted the deposit, but denied the trust, and stated that he had only held the money for *G.* to draw upon, and had many years ago paid it away by *G.*'s directions; he denied payment of interest to *S.* and *A.* The Plaintiff delivered, among others, interrogatories requiring *E.* to set out (1) the dates and particulars of the payments made by him out of the deposited sum; (2) an account of the profits made by the employment of the money in trade; (3) whether *E.* had not paid to *S.* and *A.* quarterly sums by way of interest on the moneys, and if not, then he was asked whether he had not during some and what years paid to *S.* and *A.* certain and what moneys, and whether or not quarterly, or at some and what dates and under what agreement, or for what reason or in respect of what matters; and was required to set out an account of all moneys paid by him since 1854 to *S.* and *A.*, or either of them.

E. filed an affidavit verifying his defence and denying the trust, denying the payment of any interest to *S.* or *A.* on the deposited sum, denying the Plaintiff's title, and declining to make any further answer. *Fry*, J., ordered *E.* to make a further answer as to (1) and (3). *E.* appealed.

Held, on appeal, that *E.* was not bound to answer interrogatory 1, as an answer to it could not furnish evidence to establish the alleged trust, and could not be of any use to the Plaintiff except by discrediting *E.*'s evidence if he made erroneous statements as to the particulars of his payments, and that it would be oppressive to require him to go through his books for a number of years for that purpose:

Held, further, that *E.* ought not to be compelled to answer as to the profits, for that it would be oppressive to call upon him to enter into a difficult account, which could not help the Plaintiff to obtain a decree and would be useless if a decree was not obtained:

Held, that the third interrogatory was too wide, as it extended to payments not connected with the sums to which the action related, and that the Plaintiff was not entitled to a full answer:

Held, further, by *Jessel*, M.R., and *Brett*, L.J., that as the Plaintiff had not in the Court below asked for a qualified order, but had insisted on a full answer, the order for a further answer ought simply to be discharged.

Dissentiente, *Cotton*, L.J., who was of opinion that an order ought to be made for a further answer to a limited extent.

THE Plaintiff, by paragraph 3 of her statement of claim, alleged that in or about January, 1854, the Defendant *George Wells*, who resided in *New South Wales*, brought to *England* a quantity of gold dust which he sold for £880, out of which he paid to the Defendant *Edward Wells* a sum of £600, or thereabouts, upon trust, and which *Edward Wells* received and agreed to hold upon trust to pay the income to his mother, *Susannah Wells*, for her life, and after her decease for his sister, *Ann Maybee Wells*, for life, and after her decease to divide the principal equally between the Plaintiff and her sister *Susan*, the wife of *James Kirkwood*. The claim further alleged that *George Wells* signed a declaration dated the 5th of June, 1876, certifying that the money was held on those trusts, which declaration was set out in the claim. That *Edward Wells* received the sum and employed it in his business, and realized considerable profits by its use. That *Susannah Wells* died in 1865, and *Ann Maybee Wells* on the 17th of September, 1880. That during the lifetime of *Susannah Wells* and *Ann Maybee Wells* respectively the Defendant *Edward Wells* paid them interest on the £600, but now refused to pay anything to the Plaintiff. The Plaintiff claimed to have it declared that *Edward Wells* was a trustee of the £600 for the Plaintiff and Mrs. *Kirkwood*, and consequent relief.

Edward Wells, by his defence, stated that *George Wells* had in 1854 brought gold dust to *England* and sold it, and disposed of a considerable part of the proceeds, and that on his return to *Australia*, in 1855, he left the remainder with *Edward Wells* for him *George Wells* to draw upon. That *George Wells* did accordingly draw on *Edward Wells*, and that *Edward Wells* had very many years since remitted and paid to *George Wells*, or as he had directed and requested, the whole amount which had been so left. The Defendant denied having received any money to be held upon trusts as mentioned in the statement of claim: stated that he had never heard of the declaration of the 5th of June, 1876, till he read the statement of claim, and that long before the date of the declaration he had, at the request or by the direction of *George Wells*, paid away all moneys of *George Wells* which had ever been in his hands. He denied having employed the alleged sum, or any sum in which the Plaintiff, her mother or sister were interested, in his business, and denied having paid any interest to *Susannah Wells* or *Ann Wells* on the alleged sum or on any sum, or on any profits in respect thereof.

The Plaintiff delivered the following interrogatories for the examination of *Edward Wells*:—

1. Let the Defendant *Edward Wells* give particulars of the "remainder of the proceeds of the gold dust" which the said Defendant in paragraph 3 of his statement of defence herein admits the Defendant *George Wells*, in or about the year 1855, left with him the said Defendant, and when and how, by drafts, cheques, or cash, the said Defendant (as he therein alleges) remitted and paid such amount to the Defendant *George Wells* or as he directed, and, if the said Defendant alleges that he remitted or paid the said amount by drafts or cheques, to whose order the same were respectively payable and to whom the same were respectively paid, and if by cash, to whom such cash was paid, and when and how the Defendant *George Wells* directed the said amount or any part thereof to be paid to himself, or any other and what person or persons.

2. Is it not the fact that the Defendant *George Wells* did during his stay in *England*, as in paragraph 3 of the Defendant *Edward Wells'* statement of defence is mentioned, pay to or deposit or leave with the Defendant *Edward Wells* a sum of £600, or some other and what sum? And did not the Defendant *Edward Wells* agree to hold such sum upon trust to pay the income thereof to his mother, *Susannah Wells*, for her life, and after her decease to his sister, *Ann Maybee Wells*, spinster, for her life, and after her decease to divide the principal thereof equally between the Plaintiff and her sister *Susan Whitbread Wells*, now *Susan Whitbread Kirkwood*, wife of *James Kirkwood?* Or what agreement was made between the Defendants as to the trusts or purposes upon or for which the

Defendant *Edward Wells* should hold the said sum so deposited with him.

3. What has become of the said sum so deposited with the Defendant *Edward Wells?* Did not the Defendant *Edward Wells* invest the same or some and what part thereof, or some and what moneys received from the Defendant *George Wells,* in his business, or how otherwise has the said Defendant employed, dealt with, or disposed of the same? Let the said Defendant set forth what profits he has made, and how and when, by his employment or dealings with the said sum or any part thereof.

5. Is it not the fact that the Defendant *Edward Wells* during the lifetime of the said *Susannah Wells,* and subsequently during the lifetime of the said *Ann Maybee Wells,* or during some and what period, pay to them respectively, or to one and which of them, quarterly, the sum of £6 15*s.* 0*d.* per quarter, or otherwise from time to time various and what sums of money, and whether or not as and being interest at the rate of £5 per cent. per annum upon the said sum by the Defendant *George Wells* paid to or deposited or left with the said Defendant as aforesaid? If nay, did not the said Defendant in fact during some and what years pay to the said *Susannah Wells* and *Ann Maybee Wells* respectively, or one of them, or to some other and what person or persons on behalf of them or one and which of them, certain and what moneys, and whether or not quarterly or at some other and what dates and under what agreement or for what reason or in respect of what matters did the said Defendant so pay the said moneys or any and what part thereof? Let the said Defendant set forth an account of all moneys so by him since the year 1854 paid to, for, or on account of the said *Susannah Wells* and *Ann Maybee Wells,* or either of them.

Edward Wells filed the following affidavit in answer to the interrogatories.

1. I refer to my statement of defence delivered in this action on the 8th of March, 1881, and say that such of the several statements therein contained as are within my own knowledge are correct and true, and the other statements therein are correct and true to the best of my information, recollection, and belief.

2. And I say that the Defendant *George Wells* neither in 1854

or at any other time or times left with or paid to me a sum of £600 or thereabouts, or any sum or amount whatever, or any gold dust or any proceeds thereof, upon the trusts stated in the 3rd paragraph of the Plaintiff's statement of claim, or any like trusts, or upon any trust whatever, for or in favour of the Plaintiff either alone or with her sister, or any sister or any person whomsoever, or that I in such year 1854, or any time or times, received or agreed to hold any such sum or any sums, or any gold dust or proceeds or amount whatever upon the trusts in such paragraph stated, or any like trusts, or upon any such trusts as aforesaid, or that I did at any time during the lifetime of *Susannah Wells* or *Ann Wells* or either of them pay to them or either of them £6 15*s.* per quarter or otherwise, or any sum as interest, or any sum paid to or deposited or left with me by the said *George Wells.*

3. And I wholly deny that the Plaintiff has or ever had any right, title, or interest in "the remainder of" the proceeds of the gold dust in the first of her the Plaintiff's interrogatories mentioned, or in any part thereof or in any gold dust or proceeds of gold dust which I have had or have had anything to do with.

4. And I submit that I am not obliged to further answer, and I decline to further answer, the several questions contained in paragraphs 1, 2, 3, and 5 of such interrogatories.

On the 17th of June, 1881, an order was made by Mr. Justice *Fry* in Chambers, directing *Edward Wells* to file a further answer to the interrogatories, except interrogatory No. 2. *Edward Wells* appealed.

Locock Webb, Q.C., and *T. A. Roberts*, for the Appellant:—

The Defendant ought not to be compelled to answer interrogatory 1 at all. An answer to it cannot help the Plaintiff to a decree, nor be of any use to him if he gets a decree. How the Defendant paid away the money cannot afford any evidence on the question whether it was subject to a trust or not; and if the trust is proved the Defendant must be answerable for the fund, and how he paid it away is wholly immaterial. An answer to interrogatory 3 is of no use to the Plaintiff unless he gets a decree establishing the trust. The Defendant, therefore, ought not to be compelled to answer it now.

[BRETT, L.J.:—Ought you not to apply under Order XXXI., rule 19, to have your answer postponed ?]

We proceed under Order XXXI., rule 5, as modified by the Orders of November, 1878, and our proper mode of objecting to answer is by affidavit. Even under the old Chancery practice the Defendant would not have been obliged to answer this interrogatory: *De la Rue* v. *Dickinson* (1); *Elmer* v. *Creasy* (2); *Saull* v. *Browne* (3). Under the new practice the Court clearly has a discretion: Order XXXI., rule 19; *Wood* v. *Anglo-Italian Bank* (4); and the Court will never order such discovery as this before trial when the title is denied. Then as to interrogatory 5, a full answer cannot be called for, since it extends to payments having no connection with the subject-matter of this suit. The Plaintiff has gone on to this time insisting on a full answer. The order he has obtained would enable him to attach the Defendant if he did not put in a full answer, and he cannot now on appeal get a limited order for the Defendant to answer further.

North, Q.C., and *Seward Brice, contrà* :—

As regards interrogatory 1, it is according to the old practice in Chancery, where a Defendant makes a general statement, to test his accuracy by asking him for particulars. Then, as regards interrogatories 1 and 3, we wish for an answer, because if we succeed at the hearing the admissions might enable us to get an order for immediate payment without any account.

[COTTON, L.J. :—As regards interrogatory 1, if you establish the trust, then payments to the order of the brother were breaches of trust, and you can get an order for payment of the whole sum; so your argument does not apply.

JESSEL, M.R.:—Where the title is denied, discovery, which can only be of use if the title is established, will not be ordered at once where it would be oppressive to the Defendant to order it.]

If the Defendant answers and does not shew that he paid the whole sum away as he alleges, there will be a balance which he might be ordered to pay into Court.

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(1) 3 K. & J. 388.
(2) Law Rep. 9 Ch. 69.
(3) Law Rep. 9 Ch. 364.
(4) 34 L. T. (N.S.) 255.

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[JESSEL, M.R.:—Not where your title is absolutely denied.]

An answer to the interrogatories is important for the purpose of enabling the Plaintiff to determine which course to take.

[JESSEL, M.R.:—It is not required for that. The Defendant denies your title wholly, and you are put to prove it.]

Admitting that the 5th interrogatory is too wide, the Judge below has exercised a discretion and ordered a further answer, without defining the extent to which it ought to be given. That he has not limited the discovery is no reason why none should be given.

Locock Webb, in reply:—

[COTTON, L.J:—How does the Defendant excuse himself from giving any answer to the latter part of interrogatory 5?]

An answer could not help the Plaintiff in getting a decree, the trust being denied, and it being positively stated in the affidavit that all the moneys to which the action relates were paid away by *George's* directions.

JESSEL, M.R.:—

This is an appeal from an order of Mr. Justice *Fry*. The case was not argued by counsel before him. There is no judgment, and we do not know on what grounds he decided, nor whether any of the points on which the appeal turns were considered by him.

The first objection is to answering interrogatories 1 and 3. Now, in deciding whether discovery ought to be given, we must first consider whether it will help the Plaintiff at the trial. If it will not, but will only be of use if the Plaintiff obtains a decree, then, having regard to the discretion given to the Court by Order XXXI., rule 19, we must consider whether it is fair that the Defendant should be obliged to give it at this stage of the proceedings, or whether to compel him to give it would be oppressive. As regards interrogatories 1 and 3, both those questions must be answered adversely to the Plaintiff.

The Plaintiff's case is that in 1854 a sum of money was deposited by the Defendant *George Wells* with the Defendant *Edward Wells*, upon trust to pay the interest to their mother for life, then to a sister for life, and after the death of the mother and sister upon trust for the Plaintiff and another person equally, and that *Edward Wells* employed the money in his business, but paid interest on it to the tenants for life during their lives. The defence is a simple denial of the alleged trust. The Defendant *Edward Wells* admits that he received money from *George Wells*, but denies that he received it on any trust, and says that he long ago paid away, according to the directions of *George Wells*, all the moneys he received from him. In this state of things an answer to the 1st interrogatory cannot help the Plaintiff at the trial. A detailed account of the way in which the money was paid away will not help the Plaintiff to prove the trust, and if she proves the trust, this detailed account is immaterial, since no payment made by the direction of *George Wells* would be a good discharge. The only use that could be made of the detailed discovery sought would be to discredit the Defendant's evidence if he made any inaccurate statements, or failed to set out particulars. After this lapse of time such a failure hardly would discredit him, and to require a man to go through his books for a number of years for such a purpose as this would be oppressive.

Then as to interrogatory 3, the discovery would be useless for the purposes of the trial, and would be oppressive. An account of profits would not help the Plaintiff to get a decree, and it would be oppressive to order it while the title of the Plaintiff is in dispute. No inquiry is more difficult to work out than an inquiry what profits have been made by the employment of a particular sum of money in a business. The profits of a business are attributable partly to capital, partly to the care and skill of the persons who carry on the business, and to ascertain what portion of the profits is attributable to a particular sum, leads, after decree, to a very difficult inquiry the result of which is never satisfactory. An answer to this interrogatory could not be given without an elaborate examination of the Defendant's books, which would require the expenditure of much time and trouble, and would be useless if the Plaintiff failed to establish the trust. It was urged by Mr. *North*, and I have often, when at the Bar, urged the same argument, that the Defendant's answer may enable the Plaintiff, if he succeeds, to get an immediate order for payment of the sum which the Defendant admits; but that argument is worthless as regards suc point as this, for a Defendant never makes such an admission of profits as the Plaintiff could use for this purpose.

As regards the 5th interrogatory, the first part is answered, and as to the latter part, I never saw anything more oppressive or unreasonable. It is only in family suits where a bitter feeling has arisen, that such unreasonable demands are made. A discovery such as is asked for by this interrogatory is only tolerable where the exigency of the case requires it, and here such a discovery is not necessary. An interrogatory might have been framed asking whether any payments had been made to *Susannah Wells* and *Ann Maybee Wells* in respect of the particular sum left by *George Wells* with *Edward Wells*, and I think that such an interrogatory would have been proper and must have been answered; but where an interrogatory is unreasonably wide, I do not admit that the Defendant is bound to put in an answer such as he would have been obliged to give if the interrogatory had been properly limited. In the present case, if the matter had come before me in the first instance, I should have asked the Plaintiff whether she would be content with discovery limited, as I have suggested, to payments connected with this sum, and if she had assented I should have ordered the Defendant to make a further affidavit in respect of such payments. No such step, however, has been taken; the parties are here on appeal standing on their strict rights, and I hold that an interrogatory in this form is one to which an answer ought not to be compelled.

BRETT, L.J.:—

I am of the same opinion. Something was said in argument as to the practice of the Court of Chancery, but I decline to admit that practice to be now binding with respect to answers to interrogatories. It appears to me, though it is not necessary now to decide it, that, there having been a difference between the Rules in Chancery and at Common Law on this subject, it was the intention of the Judicature Acts and Rules to introduce a new intermediate practice. This practice is regulated by the General Orders, and Order XXXI., rule 19, is the rule which governs the present case. The answers to the interrogatories to which this appeal relates could not determine any issue in the action, and if they have to be given at all they ought not to be required to be given till after the issues have been decided.

As regards interrogatory 5, the first part of it is substantially answered, and I agree with the Master of the Rolls that the Defendant ought not to be called upon to answer the latter part. If it had been confined to the mode in which the proceeds of the gold dust had been dealt with by the Defendant, I should have said that he was bound to answer it, and would not be protected from so doing by his denial of the trust, for a discovery as to the mode in which the proceeds had been dealt with might help the Plaintiff in proving her case. But the interrogatory goes far beyond that, and requires discovery which is oppressive and immaterial. If we had been sitting as Judges of first instance, I should have been inclined to hold that the Defendant ought to be directed to answer interrogatory 5, so far as relates to the proceeds of the gold dust. But the Plaintiff has gone into Chambers, not asking for a limited discovery of that kind, but for an answer to the interrogatory as it stands, has stated her case on that view, and taken an order on that footing. After this I think we ought not, on appeal, to exercise our discretion by giving her a more limited right, but must simply say that the interrogatory as it stands is one which the Defendant is not bound further to answer.

COTTON, L.J.:—

I agree with the rest of the Court as to the first and third interrogatories. A Defendant is not bound to answer questions not relevant to the relief sought. An answer to interrogatory 1 could not help the Plaintiff in obtaining a decree; nor would it be of any use to him after decree, it being a matter perfectly immaterial to the Plaintiff whether the Defendant, supposing there was a trust, paid away the trust fund to persons strangers to the trust. An answer to the third interrogatory could not help the Plaintiff in obtaining a decree; if, indeed, he obtained one, it might afterwards help him, but where discovery cannot possibly help the Plaintiff to obtain a decree, the Court has a discretion as to whether it will order it to be given before decree, and where the discovery sought is so oppressive as an answer to interrogatory 3 in this case would be, it is the duty of the Court to exercise that discretion by refusing the discovery.

The case is different as to interrogatory 5. The Defendant denies that there has been any trust. The Plaintiff wishes to sift this denial, and alleges that periodical payments were made by the Defendant to the persons who, supposing the trust established, would be entitled to the income of the trust fund, the object being to make out that these payments were by way of interest. The interrogatory involves two questions. Did you make certain payments? Did you make them by way of interest? Then the latter part of the interrogatory, which appears pointed at a denial of interest having been paid, asks whether periodical payments were not made, and if so, on what account. An answer to that might help the Plaintiff at the hearing, and I think the Plaintiff was entitled to some answer. I agree with the rest of the Court that to require a full answer to the interrogatory as it stands would be oppressive, and, whatever the old practice in Chancery may have been, I think that if a question has been substantially answered, a further answer ought not to be compelled. Here, however, the Defendant has merely denied payment of interest, and has not given any answer to the questions whether periodical sums were paid, and on what account. It is said that the Plaintiff insisted on a full answer, and must stand or fall by that claim; but I think it is the duty of the Court of Appeal to make such an order as the Court below ought to have made. In my opinion, therefore, an answer to a limited extent ought to be ordered, and such would be my decision if the determination of the case rested with me alone.

Solicitors for Plaintiff: *Moresby-White & Co.*
Solicitors for Defendant: *Ford & Ford.*

H. C. J.

C. A.
1881
Aug. 4.

Ex parte BEST. *In re* BEST.

Composition Resolutions — Registration — Presence of Debtor at Creditors' Meetings—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 126.

20 Ch.D. 281, 285–7

The meaning of sect. 126 of the *Bankruptcy Act*, 1869, is that the debtor must as a rule be personally present at the meetings of his creditors to consider a proposed composition, and personally produce his statement of affairs.

It is not sufficient that he should be in a room immediately adjoining that in which the meeting is held, ready to be called in if the creditors wish to examine him, even though the creditors are informed of this.

If he is not actually present in the room, he is bound to shew that he was prevented by sickness, or that the creditors, for some other cause satisfactory to them, excused his presence. If he does not do this, any resolutions passed accepting a composition will be invalid and cannot be registered.

Ex parte Grunelins (1) considered.

THIS was an appeal from the refusal of Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy, to register resolutions accepting a composition, which had been passed and confirmed by the proper statutory majorities of the creditors of *S. J. Best* and *W. J. Marshall*, who had carried on business in partnership as *Best, Marshall, & Co.* One of the grounds of the Registrar's refusal was that the requirements of sect. 126 of the *Bankruptcy Act*, 1869, as to the presence of the debtors at the first meeting of the creditors had not been complied with.

The registration of the resolutions was opposed by two creditors named *Taylor* and *Naylor*.

The first meeting was held in the *Guildhall Coffee House* in the City of *London*. The debtors were not actually present in the room in which the meeting was held, but they were in another room in the same house. There was a conflict in the evidence as to what took place at the meeting. Mr. *F. Greenwood*, who was a clerk to *Taylor's* solicitors, attended the meeting as his proxy. He stated that he desired to examine the debtors, and that he expressed a wish to do so to the chairman of the meeting and asked that the debtors might be called in, but that the debtors' solicitor objected to his doing so then, on the ground that the debtors could be examined at the second meeting of the creditors, and the chairman refused to allow the examination. *Greenwood* said that he understood the second meeting to mean the meeting to confirm the resolutions passed at the first meeting. The debtors' solicitor, however, said that the matter about which *Greenwood* wished to ask questions related to the separate estate of *Best*, of which *Taylor* was a creditor, and that he told *Greenwood* that the questions ought to be asked at the first meeting of *Best's* separate creditors, which would be held the same day after the first meeting of the joint creditors, and that *Greenwood*, after he had been told that, did not say a word about calling in the debtors until after the resolutions had been signed, and left the room before the meeting of *Best's* separate creditors took place.

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(1) Weekly Notes (1876), 244.

Mr. *J. A. Parry*, a solicitor, who was present at the first meeting on behalf of another creditor, said that he heard some observation made by Mr. *Greenwood*, but that he did not hear any direct request made for the attendance of the debtors. This statement was confirmed by some other persons who were present at the meeting.

The chairman of the meeting stated that no request was made to him by Mr. *Greenwood* or any one else, to allow the debtors to be called into the room.

J. Walker, a joint creditor who was present at the first meeting, said that he heard the chairman and the debtors' solicitor say that the debtors were in the next room adjoining, if anybody wished to see them.

At the second meeting of the joint creditors *Best* was examined at great length by *Greenwood*, and by *Naylor's* solicitor, and he then admitted that, five days before the debtors had filed their petition, he received a sum of £1250, of which he paid away £1200 before the petition was filed to several persons whose names he mentioned. He admitted that some of the payments were purely voluntary. They included payments of £225 to his own daughter, £100 to his solicitor, and £100 to the creditor who had acted as chairman of the first meeting. The debtors' solicitor was aware of those payments, but did not mention them to the first meeting of the joint creditors. He stated, however, that he did mention them to the first meeting of *Best's* separate creditors. At that

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meeting the creditors resolved on a liquidation by arrangement of the separate estate.

There was evidence to the effect that at meetings of creditors under liquidation petitions in the City of *London* it is not the practice for the debtor to be present in the room in which the meeting is held, unless the creditors require his attendance. He is generally at hand in an adjoining room, ready to attend the meeting if he is summoned. The reason assigned for this practice was that the creditors prefer discussing the affairs of the debtor in his absence.

It appeared also that the proceedings at the second meeting of the joint creditors were very disorderly, and that *Greenwood* and *Naylor's* solicitor were threatened with violence by some of the persons present if they continued their examination of *Best*.

The debtors appealed from the Registrar's order.

Winslow, Q.C., and *Herbert Reed*, for the Appellants :—

As a matter of fact the objecting creditors had full opportunity of examining the debtors at the second meeting, and they did examine them at great length, and received answers to all their questions. There is therefore no substance in their objection to the registration.

But it is not made essential by sect. 126 (1) that the debtor should be actually present in the room during the whole of the meeting; it is sufficient if he is present by an agent, at any rate if he be, as in the present case, in an adjoining room, ready, if required, to come in to the meeting and answer any inquiries, and the creditors know this and make no objection. This was actually so decided by the Court of Appeal in *Ex parte Grunelins* (2). The conditions imposed by sect. 126 are imposed for the benefit of the creditors, and the creditors may waive them: *Breslauer* v.

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(1) Sect. 126 provides that "The debtor, unless prevented by sickness or other cause satisfactory to such meetings, shall be present at both the meetings at which the extraordinary resolution is passed, and shall answer any inquiries made of him, and he, or, if he is so prevented from being at such meetings, some one on his behalf, shall produce to the meetings a statement shewing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due."

(2) Weekly Notes (1876), 244.

Brown (1). It is not necessary for the meeting to pass a formal resolution for that purpose, a tacit waiver is enough. The evidence as to the usual custom or practice in the City shews that the course which was adopted in the present case is what creditors prefer.

At any rate the Respondents, by going to the second meeting and then examining the debtors, shewed that they acquiesced in what had been done at the first meeting, and they cannot now be heard to complain of it. And, indeed, the matters to which the examination was addressed concern only the separate creditors of *Best*, not the joint creditors.

De Gex, Q.C., and *S. Woolf*, for *Taylor;* and *James Greenwood*, for *Naylor*, were not heard.

LORD SELBORNE, L.C.:—

We think that the decision appealed from is right. The direction contained in sect. 126 is not merely formal, but was evidently intended for important and substantial purposes. The debtor, "unless prevented by sickness or other cause satisfactory to such meetings," is to be present at both the meetings, and to answer any inquiries made of him. The satisfactoriness of the cause of his absence is to be judged of, not by the debtor or his solicitor, but by the creditors. Unless he is so prevented he is to be present at the first meeting and personally to produce his own statement of his assets and debts. It appears to me that there are very good reasons why this should be required. These arrangements ought to be perfectly fair and above board, and at the first meeting all the facts should be stated to the creditors which are necessary to inform their minds and to enable them to decide what course they will adopt. If the proper information is not given at the first meeting the matter must come before the second meeting with some prejudice. It is not at all necessary that we should lay down that there may not be a substantial compliance with the requirements of the statute, though there is not a compliance in form, as in the case of *Ex parte Grunelins* (2). There it seems to have been held by the Court of Appeal, though there is only a short note of the case, that the requirements of the statute had been substantially complied with, though the debtor did not actually come into the room in which one of the creditors' meetings was held, it being known to the creditors that he was in an adjoining room, ready to come in if he was required to do so, and no one having required his attendance. The Court seems to have thought that the creditors had either voluntarily dispensed with the debtor's attendance, or were satisfied that there was a sufficient cause for his absence. I am not prepared to say that, under the special circumstances of that case, there may not have been extremely good reasons for that conclusion. But it is to be observed that there the Court was not reversing the Registrar's decision, but was declining to disturb his order. All I can say is, I do not think that the absence of the debtor from the meeting should in any case be regarded as an unimportant or immaterial circumstance. And, if the Court is satisfied that there has been a substantial compliance with the Act, though the debtor has not been present at the meeting, it ought to come to that conclusion on a view of the whole of the evidence. In the present case there is a conflict of evidence as to the opportunity which was given to the creditors of calling for the appearance of the debtors. But the fatal flaw in the proceedings is this, that they seem to have been all based on a misconception of the requirements of the statute. It seems to have been thought, not that the debtors ought to appear at the meeting, unless their presence was dispensed with by the creditors, but that they were not bound to appear unless the creditors called for them. This was a complete misconception of the requirements of the Act. The evidence, as I have already said, is conflicting, but, looking at the whole of it, I think it is impossible to disbelieve the statements of Mr. *Greenwood*. I think the fair conclusion is that he did wish that the debtors should come in to the meeting, and that he said so, but that he did not express himself in such a way as to prevent the other witnesses from thinking that it was unnecessary that a formal resolution of the creditors should be taken upon the question whether they should be called in. I have no doubt that he did express a wish that they should come in, or that their absence was, under the circumstances, extremely material. The debtors' solicitor knew, and yet he did not state to the meeting that, five days before the petition was filed, a sum of £1200 had been received by them, and had been paid away under circumstances which at the first blush look as much like a fraudulent preference as possible. That this should have been known and not stated to the meeting seems to me extremely wrong, and I entirely demur to the notion that, because it might turn out that the separate estate of *Best* would alone be affected by the payments, the facts ought to have been withheld from the creditors on the joint estate. I believe that those facts were purposely withheld from them. Moreover, it appears that Mr. *Greenwood's* examination of the debtors at the second meeting took place under circumstances almost amounting to intimidation. I cannot, therefore, dissent from the conclusion of the Registrar.

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(1) 3 App. Cas. 672.

(2) Weekly Notes (1876), 244.

BRETT, L.J.:—

I think it is sufficient to say that the course of procedure mentioned in the 3rd sub-section of sect. 126 was not followed in the present case. I think the true interpretation of that sub-section is this, that the debtor is to be personally present at the meeting, and that he is personally to bring in his statement of affairs, unless he is prevented by sickness or other cause satisfactory to the creditors. I cannot accede to the argument that he may be present by his agent and hand in his statement of affairs by his agent, for that involves the assumption that he need never be personally present in any sense. It is said that these conditions are imposed in favour of the creditors, and that they can waive them if they please; I think that they cannot waive them unless in the case of sickness or other cause satisfactory to the meeting. It is not said that in this case the debtors were prevented from being present by any such cause; it is only said that, though they were not in the room in which the meeting was held, they were really in substance present at the meeting, because they were in an adjoining room, ready to come in if the creditors sent for them. I am not prepared to say that there might not be circumstances under which it could be properly said that a debtor was present at a meeting, though he was not actually in the room in which it was held, but they must be very peculiar circumstances. I cannot agree that if a debtor is in the immediate neighbourhood of the room in which the meeting is being held, ready to be called in if he is wanted, he is, as a matter of course, to be taken to be present at the meeting; there must be some special circumstances to entitle him to say that, though not actually in the room, still he was in effect personally present at the meeting. There must have been something of that kind in *Ex parte Grunelins* (1). But I cannot see anything to justify a similar conclusion in the present case.

COTTON, L.J.:—

I agree, and for the reasons which have been given by the Lord Chancellor, and I should not have added anything but for what has been said about a custom in the City of *London*. If that custom is such as it is alleged to be, all I can say is that it is contrary to the statute, for that requires that as a rule the debtor should be personally present at the meetings. That his personal presence is intended is plain from the provision that "he, or, if he is so prevented from being at such meetings, some one on his behalf," is to produce to the meetings his statement of affairs. Of course, there may be cases in which, though he is not actually in the room, he ought to be treated as having been personally present at the meeting. And though, if any creditor desires to ask the debtor questions, the majority cannot prevent him from doing so, yet if all the creditors excuse him that is another matter. But, if the custom in the City is, as it is stated to be, that as a rule the debtor need not be in the room unless the creditors send for him, it is contrary to the Act. In my opinion the debtor must be in the room unless the creditors excuse him.

Winslow asked that a fresh first meeting of the creditors might be summoned, as was done in *Ex parte Terrell* (2).

LORD SELBORNE:—There has been no slip in the proceedings, and it is not, therefore, a case in which we ought to allow a fresh meeting.

Solicitor for Appellants: *F. Bradley.*

Solicitors for Respondents: *Munns & Longden; Jones & Hall.*

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(1) Weekly Notes (1876), 244.

(2) 4 Ch. D. 293.

W. L. C.

Ex parte WILLIAMS. *In re* WILLIAMS.

C. A.
1881
Aug. 4.

22 Ch D 774

Bankruptcy—Composition Resolutions—Small Amount of Composition—Want of Bona Fides—Registration—Duty of Registrar—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 126—*Bankruptcy Rules*, 1870, *r.* 295.

When the Registrar is satisfied, either from the small amount of composition offered or otherwise, that resolutions accepting a composition have been passed in the interest of the debtor, and not for the benefit of the creditors, it is his duty to refuse to register them, even though no creditor opposes the registration.

Resolutions accepting a composition of 2*d.* in the pound, payable in three months, and not secured in any way, were passed by the statutory majority of a debtor's creditors. His statement of affairs shewed that he had no assets:—

Held, that the resolutions must have been passed in the interest of the debtor, not of the creditors; that they could not therefore bind the dissentient creditors; and that the Registrar was right in refusing to register them, though no creditor opposed the registration.

Ex parte Elworthy (1) not followed.

THIS was an appeal from the refusal of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy, to register resolutions accepting a composition which had been passed by the statutory majority of the creditors of *John Williams*.

The debtor's statement of affairs shewed that his debts amounted to £1167 8*s.* 7*d.*, and that he had no assets. At the first meeting of the creditors on the 13th of May, 1881, there were present or represented twenty-one creditors, whose debts amounted to £811 1*s.* 11*d.* Of these, sixteen, whose debts amounted to £706 7*s.* 11*d.*, assented to resolutions accepting a composition of 2*d.* in the pound offered by the debtor.

The composition was to be payable in three months from the date of the registration of the resolutions, and was not to be secured in any way. The resolutions were thus passed by the proper statutory majority. At the second meeting, held on the 27th of May, ten creditors were present or represented, their debts amounting to £357 15*s.* 10*d.* Of these, eight, whose debts amounted to £285 15*s.* 10*d.*, assented to the confirmation of the resolutions. No creditor opposed the registration of the resolutions, but the Registrar refused to register them, "on the ground that the payment of the composition of 2*d.* in the pound unsecured is solely in the interest of the debtor, and not for the benefit of the creditors."

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(1) Law Rep. 20 Eq. 742.

The debtor appealed.

S. Woolf, for the Appellant:—

The statutory requirements having been complied with, and no creditor opposing the registration, the Registrar has no discretion under rule 295 to refuse to register the resolutions: *Ex parte Elworthy* (1). There is no evidence of improper motives on the part of the majority as there was in *Ex parte Terrell* (2); and in that case the registration was opposed by a dissentient creditor.

[COTTON, L.J.:—Is it possible to suppose that a composition of 2*d.* in the pound could be accepted for the benefit of the creditors and not purely in the interest of the debtor? In order to bind the dissentient creditors must not the Registrar be satisfied that the resolutions have been passed *bonâ fide* in the interest of the creditors?]

In *Ex parte Early* (3), and in *Ex parte Mathewes* (4), the Court of Appeal allowed the registration of liquidation resolutions in cases where the assets were practically *nil*, and an immediate discharge was given to the debtor.

[COTTON, L.J.:—In those cases the Court was satisfied that the resolutions had been passed in order to save the assets from going to one creditor.]

In *Ex parte Williams* (5), a case subsequent to *Ex parte Terrell*, *Bacon*, C.J., followed his own previous decision in *Ex parte Elworthy*.

No one appeared to oppose the appeal.

LORD SELBORNE, L.C.:—

The principle enunciated by the late Lord Justice *James* in *Ex parte Terrell* (6), a principle which he stated as his interpretation of decisions which he considered binding on the Court, was this, "that the resolutions must be passed *bonâ fide* in the interest of the creditors, and must not be mere sham resolutions. The facts of the present case shew that the resolution could not have been passed *bonâ fide.* The debtor had no assets; he merely gives his promise to pay the composition, and nobody else offers to give any security for it; the creditors merely accept the hope that the son will in the course of a month find the money to pay it. That is not the sort of arrangement which, as it appears to me, was contemplated by the Act as one which could bind the dissentient minority of the creditors. I think the Registrar was quite right in refusing to register the resolution." And Lord Justices *Baggallay* and *Brett* concurred in that view. The present case is exactly the same as *Ex parte Terrell* (1), in that the debtor has no assets, and there is only his promise to pay the composition. The only difference which I can see between the two cases, viz., that the composition is to be paid in three months instead of in one, makes the terms worse for the dissentient creditors in the present case than in *Ex parte Terrell.* The debts amount to £1167; the assets are said to be nothing; and a composition of 2*d.* in the pound, which would amount in the whole to less than £10, and which is to be payable three months after the registration of the resolutions, is imposed on the dissentient creditors. I am of opinion that it is not in accordance with the true purpose and intent, with the spirit and justice of the *Bankruptcy Act*, that such an arrangement, under the name of a composition, should be imposed by any number of creditors who choose to vote for it upon the others who dissent from it. Sitting as a judge of fact, I am clearly of opinion that these resolutions could not have been passed in the interest of the creditors, but must have been passed with the view of favouring the debtor. They cannot therefore bind the dissentient minority, and the Registrar was right in refusing to register them.

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(1) Law Rep. 20 Eq. 742.
(2) 4 Ch. D. 293.
(3) 13 Ch. D. 300.
(4) 16 Ch. D. 655.
(5) 36 L. T. (N.S.) 324.
(6) 4 Ch. D. 296.

BRETT, L.J.:—

I am of the same opinion. The undisputed facts of the case appear to me to justify the Registrar in his conclusion that the

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(1) 4 Ch. D. 293.

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resolutions were passed "solely in the interest of the debtor and not for the benefit of creditors," and, that being so, the authorities which have been cited shew that, when the Registrar is satisfied that such is the case, he is justified in refusing, and is bound to refuse to register the resolutions.

COTTON, L.J.:—

I am of the same opinion. The only point which has not been touched on by my learned Brothers is whether, in the absence of opposition by any creditor, the Registrar was entitled to refuse to register the resolutions. I think he was, if, upon the evidence, he was of opinion that they had not been passed *bonâ fide* in the interest of the creditors. The Act gives the majority of the creditors very large powers to bind the minority, and, in my opinion, they ought to be strictly watched in the exercise of those powers. Even in the absence of fraud, and even if there is no opposition to the registration, if it appears that what the majority have done has been done, not in the interest of the creditors, but in order to shew favour to the debtor, in my opinion the Registrar is bound to refuse to register the resolutions. In the present case I think the facts shew that the resolutions were passed to favour the debtor and not to benefit the creditors, and therefore the Registrar was quite right in refusing to register them.

Solicitor: *E. Farman.*

W. L. C.

FREME *v.* CLEMENT.

[1880 F. 0432.]

M. R.
1881
Jan. 18, 25.

Power of Appointment—Will—Testamentary Appointment—Wills Act (1 *Vict. c.* 26)—*Power created before but exercised after Act—Void Appointment falling into residuary Appointment—" Devise."*

An instrument exercising a special or general power of appointment over property must be executed and construed according to the rules for the time being applicable to instruments of that kind, although the power may have been created before, but exercised after, an alteration in the law as to the construction and mode of execution of such instruments.

The word "devise" in the *Wills Act* includes in general a devise by way of appointment under a special or general power: consequently, where a testator makes a will operating as an exercise of a special or general power, a devise of real estate by way of appointment which fails or is void, falls, under sect. 25, into the residuary devise (if any) by way of appointment, unless a contrary intention appears by the will.

BY an indenture of release dated the 15th of May, 1822 (being a settlement made subsequently to the marriage of *William Purser Freme* and *Anna Tryphosa Freme*, his wife, in pursuance of an antenuptial agreement), certain real estate belonging to Mrs. *Freme* was conveyed to trustees, in trust for Mrs. *Freme* for her separate use for life, with remainder in trust for *William Purser Freme* for life, with remainder " in trust for all or any of the children, grandchildren, or other issue of the said *Anna Tryphosa Freme* by her said husband, for such estate and estates, interest and interests, in such manner, and for and in such parts, shares and proportions, and subject to such conditions, restrictions and limitations, and with such directions or regulations for maintenance, education, and advancement, and to be vested and payable, conveyed and assured, when and as the said *William Purser Freme* should by deed or by will appoint; and, until the same, or in default thereof and subject thereto, in trust for the child, if only one, or, if more than one, then in trust for all the children equally, share and share alike, of the said *W. P. Freme* and *A. T. Freme* who might be living at the decease of the survivor of the said *W. P. Freme* and *A. T. Freme*, and the issue of any of them who might be then dead, such issue standing *in loco* *parentis*, as tenants in common, his, her, or their heirs and assigns, and to become vested in him, her, or them respectively on his, her, or their respective marriages, or on their respectively attaining the age of twenty-one years.

Mrs. *Freme* died in 1869.

William Purser Freme died in 1878, having made a will, which was dated in 1877 and commenced as follows:—

"This is the last will and testament of me, *William Purser Freme*, of &c., and which will I declare shall be an exercise of any power of appointment vested in me, and shall be subject to the trusts of my marriage settlement." The testator then devised certain hereditaments (being part of the real estate comprised in the settlement of 1822) to his son, *James Freme*, for life, with remainder to the children of the said *James Freme*, as he, the said *James Freme*, should by deed or will appoint, and, in default of such appointment, amongst all the children of the said *James Freme* who being a son should attain the age of twenty-one years, or, being a daughter, should attain that age or marry under that age, equally between them. And after bequeathing certain annuities and legacies, charging the former partly on real estate comprised in the settlement and partly on his own property, the testator "devised all his real and personal estate not thereinbefore disposed of unto the said *James Freme* absolutely."

The testator was entitled to real estate other than that comprised in the settlement.

The testator had four children by his said marriage, of whom two, a son and a daughter, died in his lifetime (the daughter leaving children), and two survived him, namely, his said son, *James Freme*, and a daughter.

This action was instituted by *James Freme* against his surviving sister, the children of his deceased sister, his infant children, and the trustees of the settlement and of his father's will, for the purpose (amongst other things) of having it declared whether or not the will of *William Purser Freme* operated as an appointment under the settlement, and of having the rights of all persons interested under the settlement ascertained and declared; also, so far as might be necessary, to have the trusts of the settlement carried into execution by the Court.

The action now came on upon motion for judgment.

The first question was one of construction of the will—whether the testator had indicated an intention that his will should operate as an appointment under the testamentary power given to him by the settlement of 1822; and upon this his Lordship decided that the will, including the residuary devise, was an intended exercise of the power, and was valid as such, except as to the devise in remainder in favour of *James Freme's* children, which his Lordship held—and was in fact admitted at the Bar—to be a void appointment, as being too remote.

The question that then came on for argument was whether the subject of this void appointment in remainder passed under the residuary devise or appointment to the Plaintiff, *James Freme*, or whether it passed under the settlement as in default of appointment, that is, in thirds to the Plaintiff, *James Freme*, his surviving sister, and the children of his deceased sister.

Davey, Q.C., and *C. Stewart*, for the Plaintiff:—

There is no direct authority upon the point whether a residuary devise of real estate in a will that operates as an execution of a power includes a prior void devise by way of appointment; but, upon principle, we submit that a will executing a power should be construed in precisely the same manner as a proper will; in other words, that a will executing a power should be construed as an ordinary will (irrespective of its being an instrument of appointment) according to the rules of construction applicable to a will: *Sugden* on Powers (1), *Duke of Marlborough* v. *Lord Godolphin* (2).

Therefore, in construing the present will or testamentary appointment, and the effect of the residuary devise, it is necessary to consider the provisions of the *Wills Act* (1 Vict. c. 26). The Act contains no definition of the word "devise," but the first section says that "the word 'will' shall extend to an appointment by will or by writing in the nature of a will in exercise of a power;" so that the present "appointment by will" must be read as a "will," and as such subject to the rules of construction laid down by the Act. Then sect. 24 enacts that every will shall, unless a contrary intention appears, be construed to speak from the death of the testator; and in *Stillman* v. *Weedon* (1) this section and the 27th were applied to a will containing a residuary bequest to the testator's children, which was held to be a good execution of a power of appointment among children, although the will was made before the execution of the power. Then sect. 25 enacts that, unless a contrary intention appears, the real estate comprised in a devise "which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise." Reading the word "devise" as including an "appointment," that section is clearly applicable to the present case. Then sect. 28 says that a general devise "shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will." Though there is no reported case upon the point, it is conceived that a great many titles must depend on that section being applicable to an appointment by will under a power. Suppose a man has power to appoint by will *Blackacre* to any of his children, and he makes a will saying, "I devise *Blackacre* to my son *John*," it would be an extraordinary thing to hold that the section did not apply to an appointment, and, consequently, that the gift did not carry the fee simple. It has been held that the section against lapse, sect. 33, applies to a testamentary appointment: *Eccles* v. *Cheyne* (2); in opposition to *Griffiths* v. *Gale* (3), in which, according to Lord *St. Leonards* (4), an erroneous view was taken of the Act. And it has also been held that where a legacy is appointed under a limited power, and the appointment fails either by lapse or as being excessive, the legacy falls into the residuary gift, provided the residue is given to proper objects and there is a clear intention to dispose of the entire fund subject to the power: *Falkner* v. *Butler* (5); *Oke* v. *Heath* (6); *In re Harries' Trust* (7); *In re Meredith's Trusts* (8); *Champney* v. *Davy* (9), where Vice-Chancellor *Hall* considered that a

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(1) 8th Ed. p. 442.

(2) 2 Ves. Sen. 61, 77.

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(1) 16 Sim. 26.

(2) 2 K. & J. 676.

(3) 12 Sim. 355.

(4) Sugden on Powers, 8th Ed. p. 463.

(5) Amb. 514.

(6) 1 Ves. Sen. 135.

(7) Joh. 199.

(8) 3 Ch. D. 757.

(9) 11 Ch. D. 949.

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will executing either a special or general power should be construed in the same way as a will operating by way of devise or bequest. No doubt these were all cases relating to personal estate only, but in the present day the Court will not favour distinctions between real and personal estate as regards the exercise of powers: *In re Van Hagan* (1). There is no magic in the word "devise" or "bequest": all the Act means is disposition, whether by devise, bequest, or appointment; and this construction makes the whole Act consistent. Although in the present case the testamentary appointment was made in pursuance of a power created prior to the *Wills Act*, yet its execution as required by that Act is a valid execution of the power: sect. 10. Upon the whole, we submit that this will shews upon the face of it an intention to appoint the whole of the property subject to the power, and accordingly that the residuary devise or appointment is, by analogy to the rules of construction applicable to ordinary wills, sufficient to pass any property comprised in a prior gift or appointment which has failed.

Macnaghten, Q.C., and *J. H. Redman*, for the Defendants, the Plaintiff's surviving sister and her son; the former being interested under the trust declared by the settlement of 1822 in default of appointment, and being also an annuitant under her father's will; the son being also an annuitant under the will:—

Lord *St. Leonards* is of opinion that, although a general devise will, under the statute, operate as an execution of a general power of appointment, the statute does not extend to a limited power: *Sugd.* Real Prop. Stat. (2).

We submit, moreover, that, inasmuch as the power in the present case was created prior to the *Wills Act*, the will purporting to be an exercise of it must be construed as if made at the time the power was created; in which case the will, not having been executed as required by the law existing at that time, is not a good execution of the power.

William Barber, for the Defendants, the children of the Plaintiff's deceased sister.

(1) 16 Ch. D. 18, 31, 33.

(2) 2nd Ed. p. 378.

Northmore Lawrence, for the trustees of the settlement of 1822.

L. Field, for the trustees of *W. P. Freme's* will.

Jessel, M.R.:—

The case before me appears, so far as I know, and so far as the researches of counsel, who have assisted me to the utmost of their ability (which, I need not say, is very great) upon the present occasion, have gone, to raise an entirely new point: therefore, according to my mode of dealing with a novel question, I must decide it upon principle; that is, a principle to be extracted from former decisions, from the general rules of the Court, and from the nature of the law.

I will first of all consider what the nature of a power of appointment is; for, oddly enough, in deciding what the principle governing this case is, we come back to first principles. A power of appointment is a power of disposition given to a person over property not his own by some one who directs the mode in which that power shall be exercised by a particular instrument. I consider that the donor of the power must mean it to be exercised according to the law governing that particular instrument. If, therefore, it is a power to be exercised by deed or will, in my opinion it must be exercised, if by deed, by an instrument executed in the mode in which the law requires a deed to be executed, that is, sealed and delivered; and it must also, when executed, be subject to the law which governs the construction of a deed. It must be in all respects a deed, and be treated in all respects as a deed: so that, if there were a power to appoint a freehold estate by deed, and a person exercising the power simply appointed it to *A. B.*, without the necessary words of limitation superadded, *A. B.* would take for life only. If, on the other hand, the power were exercised by will, and assuming for this purpose the power to have been created after the passing of the *Wills Act*, then the appointment in the same words would give the fee simple.

I state that by way of illustration. I think, therefore, that the instrument exercising the power is to be dealt with in all respects precisely in the same way as if it were an ordinary instrument disposing of the appointor's own property. That makes the whole thing intelligible, and is exactly in accordance with the view expressed by a very eminent Lord Chancellor, namely, that where the appointor intends the property to be appointed by a given instrument, he means the whole law applicable to that instrument to apply. If that is so, this will follow: that in construing the instrument of appointment all the rules applicable to limitations by a similar kind of instrument will apply.

Take another kind of illustration: a gift, even under the old law, to *A.* and his issue by deed would not create an estate tail. I am speaking, of course, of a freehold estate. If the power was to appoint by deed or will, and the donee of the power executed a deed appointing to *A.* and his issue, *A.* would not take an estate tail; whereas, if he executed a will appointing in the same words, *A.* would. They are the same words in both cases, but occur in different instruments: so that I think it may be taken to be a general rule of law, that the law governing the instrument, both as to execution and construction, will govern it when it is an appointment.

Taking, then, that as a general principle, I now come to the very curious point which arises in this case. Supposing the instrument creating the power is dated before an alteration in the law as to the construction or mode of execution of instruments exercising powers, as in this particular instance—the instrument creating the power being dated a great many years before the passing of the *Wills Act*, and the power being exerciseable by deed or will—what would be the effect of an alteration of the law on the mode of execution or construction of the instrument exercising the power? I will first take the execution: suppose the law were altered, as it has in fact been altered, as to execution of the instrument when testamentary. A will of real estate formerly required three witnesses, but now requires two. Suppose the power was to be exercised by will, could it have been said that a will executed as a will was required to be executed, that is, attested by two witnesses, was not a will? What does the word "will" mean? Must it not mean a will according to the law in force at the time of the appointment? I think that is the meaning of it. A man who gives a power to appoint by deed, or to appoint by will, must

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mean a deed or will according to the law, if he says no more and provides no particular means of execution or attestation other than that which the law requires for the sufficient execution or attestation of such an instrument. And it seems to me that if the law changes, the law to be applied must be the law of execution at the time of the exercise of the power, for that is the period which is pointed out by the settlor. The appointment is to be by deed or will, that is, by an instrument answering the description at the time the appointment is made. For instance, there may be wills, as in fact there were, of personal estate, not requiring attestation, and which would yet be capable of passing property subject to a power of appointment; but then the law may change and require attestation. Supposing, then, a man purports to make an appointment by an unattested will after the change in the law; the question is, Is it a will? The answer is, It is not a will at the time of the appointment, and therefore an unattested instrument will not operate as an appointment. That appears to me to get rid of what at first sight seemed to be a difficulty in the present case.

Then, is there any difference between the rules applicable to construction and the rules applicable to execution? I think not. If a change takes place in the law—supposing I am right in my general view that an instrument executing a power is to be an instrument executed according to the existing law affecting instruments of a like nature—the same rule would apply to an instrument executed after the change of the law as regards its construction which applies as regards its execution. It seems to me, therefore, that, according to principle, the proper mode of dealing with an instrument executing a power is to construe it exactly like an instrument of the same character disposing of the appointor's own property. If that is so, then it follows that the Act of Parliament which now makes a void devise fall into the residue applies, whether the power be a special power or a general power, provided one can find, as I have found in this will, an intention to execute the power by the gift in the residuary clause.

But then arises another question, namely, whether the Act of Parliament has itself altered the law as regards appointments independently of those considerations, because those considerations assume that the Act of Parliament has done so, and has not merely altered the law as regards the execution and attestation of wills disposing of the testator's own property, remaining entirely silent as to the exercise of a power of appointment. It appears to me that this second question, as to whether the Act of Parliament provides for the matter or not, is one of very great difficulty; and I am free to confess that it has presented more difficulty to my mind than the first question. On the whole, after having read the Act of Parliament very carefully, and having heard the comments of counsel upon it, my opinion is that the Act does itself effect such an alteration in the law. I agree that the Act is not so well framed as it might have been, and that there are difficulties in every possible mode of construction; still there are guides that often help me in arriving at a conclusion as to the effect of an Act of Parliament, namely, general principles.

In the first place, this is an Act for the amendment of the law with regard to wills: that is, all wills; as much wills made in the exercise of a power of appointment as any other wills. That is quite plain from the 1st section, which says, "The word 'will' shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power." Therefore there is no doubt that those words actually amend the law generally.

We have found that the Act certainly applies to testamentary appointments as well as to what I call by distinction wills, although they are both wills; for a will in exercise of a power is as much a proper will as any other will: and seeing that the Act applies to both, the next question to be considered is this—What could the intention of the Legislature have been? They provide an amendment of the law as regards execution and construction. Can it be supposed for a moment that it was not intended that the same rules of execution and construction should apply to a will in exercise of a power as to a will not in exercise of a power? Is it reasonable to imagine that the Legislature enacted one set of rules for the construction of the same instrument when it operates as a disposition of the testator's own property, and another set of rules when it operates as an exercise of a power? Take the simple instance I have mentioned as an illustration. Is it to be supposed that the Legislature, knowing that the word "heirs" or similar words of limitation were constantly omitted from wills, although the testator intended the object of his bounty to take the fee simple of the freehold estate, and having therefore provided that in future a gift without words of limitation of the testator's own freehold property should pass the whole fee simple if he had it, should have left a different rule to be applied as to the exercise of a power of appointment, the same slip occurring in a will in exercise of a power as habitually and frequently as in a proper will? It is hardly conceivable that such could have been the deliberate intention of the Legislature; and therefore if this has really happened according to the true construction of the Act of Parliament, it is clearly a case omitted by mistake or misadventure. But as I have very frequently said, if we can fairly construe an Act so as to carry out what from the nature of the case must obviously have been the intention of the Legislature, although the words may be a little difficult to deal with, and although they may possibly admit of more than one interpretation, we ought to adopt that interpretation which will make the law uniform, and will remedy the evil which prevailed in all the cases to which the law can be fairly applied.

There is another observation to be made, and it is this: I have said at other times, and in another place, that it is not desirable at the present day to multiply the artificial distinctions between real and personal estate; and the Act of Parliament in question is exactly framed with that view: it does diminish the distinction. It does so in the very case I have mentioned, the absence of words of limitation, and in very many other cases. The Act does, therefore, to a certain extent, proceed to establish uniformity of law; and that is a consideration not to be overlooked.

That being so, I shall now look at various sections of the Act to see whether or not the word "devise" and the word "devised" are in this Act of Parliament used in reference not merely to what I will call property devised—I mean a devise of a man's own property, but also to a devise by way of appointment of other people's property. The word "devise" has no special meaning, so that it is not appropriated to that which is the man's own property, any more than the word "bequeath" is. You may well call that a "bequest" which is a gift by will in exercise of a power of appointment of personal estate; or you may call that a "devise" which is a gift by will, in exercise of a power of appointment, of real estate: and indeed the words "devise" and "bequest" are not strictly limited to either real or personal estate. They may be both used for both kinds of estate.

That being so, we have, first of all, some sections which I must not overlook, in which, undoubtedly, both terms are used. The first section I will consider is the 15th, which enacts that "If any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made," &c. No doubt there we have not only the word "devise," but also the word "appointment;" but the answer is, the section contains words which are superfluous. It cannot be argued that a "devise" would not have included an appointment had the word "appointment" not been used; for there are the words "estate, interest, gift," which include everything. Therefore, the mere fact that the draftsman has used six words where two would have sufficed, does not shew that all the six words are distinct, and it appears to me to be plain that this section cannot be used to shew that "devise" may not include "appointment."

The next section which has some little bearing on this point, though not much, is the 24th:—"Every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator unless a contrary intention shall appear by the will." That certainly applies to an appointment, for the word "comprised" does properly include anything that passes by the instrument.

The next section, the 25th, is the most important: "Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will." That is the section which I have really first to consider. The words are "comprised in any devise in such will contained." I think I shall be able to shew presently that the word "devise," as used in other sections, comprises a devise by way of appointment as well as a devise by disposition of the testator's own property. Assuming for a moment that that is the fair construction of the word, or even a fairly possible construction of it, what was the object of the section? Its object was to treat the testator as intending to dispose of all he had power to dispose of, that is, whether by reason of it being his own property, or by reason of it being subject to a power given by another person. It must be remembered that, after all, every will is in exercise of a power, not technically, but generally. It is a power given by the Legislature to a man to direct what shall become of his property after his death. It is a mere power; and indeed so much is it a power according to the English Law, that there was a time when a man did not possess that power: it was given to him by statute. It is really a power of disposition, and it is a power of disposition which by this very statute is extended; for, when the 3rd section is looked at, it will be found that a power of disposal is given of property over which the man had no power of disposal by will before the statute was passed. So late as 1837 there was some property which could not be disposed of by will, as certain kinds of copyholds, and so forth. So the power really was given for the first time by this Act. When we speak of a "devise," we mean a devise which is the exercise of a power of disposition given to a man either by the Act of Parliament or by some person. Why should we restrict the meaning of the word, if we find an intention to dispose of the property? The evil that the Act of Parliament meant to remedy was this: the law was that a general residuary devise was, in effect, a specific disposition of such real estate only as the testator then had, and had not left to any one else: the consequence was that if any person to whom real estate was devised died in the lifetime of the testator, the residuary devisee had no claim to the real estate the gift of which had so failed, but it descended to the heir-at-heir. It was considered, however, that where a man gave the residue of his own property he did not intend his heir-at-law or his next of kin in case of personal estate to take anything, and it was therefore made a rule of construction by this Act that the gift of residue should include lapsed and void devises. It had already been the rule as to personal estate, and the Act extended the rule to real estate in accordance with the presumed intention. That was the meaning of the Act. If the presumed intention had been the other way, the Act would have cut down the effect of the residuary bequests as regards personal estate; but it was to effect the intention that this enactment was made. If a man having a power of appointment, not given by statute, but given by some settlor over property which did not belong to him, gave the residue of the property over which he had the power of appointment, such gift did before the Act, as regards personalty, include lapsed and void appointments. The rule as to a gift of personalty being by the Act extended to realty, why should it not apply to the exercise of a power of appointment over realty? One of the two rules was to prevail. Which rule? The rule as to personalty, that is, that lapsed and void gifts are to fall into the residue. Therefore we should expect that where the testator had a power of devising property subject to a special or general power of appointment conferred by another, and he gave all that which he had not "hereinbefore disposed of," or, all the residue subject to that power, he would prefer his residuary appointee to the persons taking in default of appointment, on the same principle as in the other case he preferred his residuary legatee to his next of kin. If the words admit of it, that is the proper interpretation, because it carries out the intention. I do not think there is any difficulty in the first words of the section. I shall shew that in other sections of the Act the word "devise" must be read as including appointment. The other words of the section are, "included in the residuary devise (if any) contained in such will." I admit that those words create very great difficulty, and that opinions may differ as to the meaning of them. First of all, the words are "the residuary devise," apparently pointing to only one; and in the next place it may be said to throw unappointed property, or property which becomes unappointed by reason of lapse or by reason of invalidity of appointment, into the residuary devise

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proper. I think that is too narrow a construction, although I say it with some hesitation. Why cannot the words "the residuary devise (if any)" be read as including appointment as well as devise? Then we have the residuary devise whether of the testator's own property or of property over which he has the power of appointment.

As I have said before, I have come to this conclusion with some hesitation. No doubt it is very difficult to construe the section in the way I have construed it, unless you assume that the word "devise" includes a devise either of his own property or by way of appointment. That it does so in other sections, I think, is tolerably plain. The 26th section is so difficult to deal with that I pass over it.

The 27th section applies to a general devise, including estates over which the testator has a general power of appointment. Just consider for a moment what the other construction, as applied to this 27th section, would lead us to. The words are, "a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will." Suppose a testator gives *Blackacre*, over which he has a general power of appointment, to *A.*, and all other his real estate to *B.*, is it to be held that if *A.* dies in the testator's lifetime, *B.* is not to take under the latter gift? It would be a remarkable result. Suppose, again, he gives *Blackacre*, over which he has a general power of appointment, to *A.*, and all his residuary estate over which he has a general power of appointment to *B.*; again, one cannot help asking the question, would not it be a most remarkable result that the death of *A.* in the lifetime of the testator should create an intestacy as to *Blackacre*, instead of throwing it into the residuary gift.

Then the next section is the 28th: "Where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the

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whole estate or interest which the testator had power to dispose of by will in such real estate." Here the word "devise" appears to me plainly to include the property over which the testator has a power of appointment, because the section says such devise shall include not merely the fee simple, but the whole estate which the testator had power to dispose of by will. The section does not say, "the whole estate or interest which the testator was entitled to," but that which he "had power to dispose of by will"; and it clearly includes, therefore, in those words what he had a power to dispose of by appointment by will. Now, how could that work at all, unless the previous words "devise" and "devised" included property over which he had a power of appointment? Again, look at the effect given to a devise made without words of limitation. The section says such a devise shall pass the fee simple, because that is the ordinary intention of people who devise without words of limitation. It would be a most extraordinary result if a gift to *A.*, when the testator had a power to dispose of the fee simple, would not pass the fee simple, because it was a gift under a special or a general power conferred by an individual, when it would pass it if it was the exercise of a power given by the Legislature to the testator to dispose of his own property after his death. I think that shews that the words "devise" and "devised" include appointment.

Then as to the next section, the 29th, the same observations may be almost repeated. The words are, "In any devise or bequest of real or personal estate," the words "die without issue," and so forth, shall be construed in a certain manner. In the first place, this applies to both real and personal estate. The law as to appointments of personal estate was undoubtedly the same as the law as to proper wills of personal estate. Was it intended to make a new law under the word "bequest," so that a "bequest" of a man's own property should have a particular meaning, while an appointment would have no meaning, or a non-intended meaning, if I may coin such a word, simply because the Legislature had not made an enactment in terms as regards appointments? It seems to me that the words "devised," and "devise or bequest," must include devise or bequest by way of appointment, or devise or bequest under a general power conferred by others as well as of the testator's own property. Then the 30th section says, "Where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate." It appears to me that the words "devised" and "devise" must include devises by way of appointment under special or general powers as well as devises of a testator's own property; and in fact the same observations I have made as to the preceding sections apply to this section.

The 31st section is probably another drafting of the 30th, and the same observations apply to that. I believe the real history of the two sections is, that they are two drafts dealing with the same subject, though both remain in the Act of Parliament. However, they are so similar, and every word I have said on the 30th applies with such equal force to this section, that I need not repeat my observations.

I now come to the 32nd section, which is this: "Where any person to whom any real estate shall be devised for an estate tail or an estate in quasi-entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail"—and so forth—the estate tail shall take effect. Can anybody suppose that that is not to apply to an appointment; that the same evil which occurs in the one case, and which is intended to be remedied by the Legislature with regard to the testator's own property, is not intended to be remedied in the case of an appointment? There cannot be any reason for such a supposition. The object of the enactment is to carry out the testator's intention, namely, that the estate tail shall go on as long as there is issue inheritable under the limitations; for, by an artificial rule of law, it was decided, contrary to the intention, that the gift in tail lapsed. It appears to me that the words there are clearly applicable to a devise by way of appointment as well as to a devise by way of disposition of the testator's own property.

The 33rd section is not so clear: in fact, it has been held not to apply to an appointment; but I take it that the decisions must be treated as founded really—although they are not so in form—upon the fact of the section not applying where the object of th power is not within it. But the point has yet to be decided whether that section does not apply to powers of appointment (in cases where an appointment would be warranted), such as general powers, and perhaps some special powers. However, at the present moment it is only necessary to say that I am not at liberty to draw any special conclusion from the use of the words "devise" and "bequest" in the section.

I have gone through, I believe, every section which has any bearing on the question before me, and I have come to this conclusion, that, having regard to all these numerous sections, the word "devise" in this Act of Parliament does include, unless a contrary intention appears by the will, a devise by way of appointment under a special or a general power conferred on the testator as to property not his own: consequently, it is so to be read in the 25th section; and, for the reasons I have already mentioned, the difficulty of construing that section is not great enough to prevent me from giving effect to what I conceive to be the intention of the Legislature as manifested in the Act.

I think, upon both the points I have discussed, my decision should be in favour of the void devise passing under the residuary clause in this will; and I so decide.

His Lordship made a declaration that the will operated as an execution of the power of appointment amongst the children, and that the residuary devise and bequest in the will operated as an appointment under the power: also that the gift, after the Plaintiff's death, was a void appointment, and that it fell into and passed to the Plaintiff by the residuary gift or appointment.

Solicitors: *Field, Roscoe, & Co.; Dean & Taylor; Brownlow & Howe; R. M. & F. Lowe.*

G. I. F. C.

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SMITH *v.* DALE.

[1874 S. 264.]

Administration—Costs—Executors appearing by same Solicitor—Defaulting Executor—Bankruptcy.

24 Ch D 866-7
23 Ch D 197-9
201
25 Ch D 177-9
180-1

Two executors, Defendants in an administration action, were represented by the same solicitor, to whom they had given a joint retainer. One of them was a debtor to the estate, and became bankrupt:—

Held, that the costs incurred by them prior to the bankruptcy should be distinguished, and that the solvent executor should be allowed only his own proportion out of the fund, the defaulter's proportion being set off against the debt due from him: but that the costs incurred by both subsequently to the bankruptcy should be allowed in full.

Watson v. *Row* (1) dissented from.

IN May, 1875, a decree was made in this action for the administration of the estate of a testator, *Charles Dale*, the Plaintiff being a person beneficially interested in the estate, and the Defendants, *George Dale* and *John Dale*, being the executors of the will. During the progress of the action the executors gave a joint retainer to a solicitor to act for them in the action.

In taking the accounts under the decree it appeared that part of the personal estate of the testator consisted, at the time of his death, of a sum of £150 due from *John Dale*, and that *John Dale* still remained so indebted to the estate, but had become bankrupt.

The action now coming on for further consideration, the question arose whether the costs incurred by *George* and *John Dale* under their joint retainer should be allowed in full out of the estate, or whether their costs should be distinguished and *John Dale*'s costs set off against the £150 due from him to the estate, it being proposed to make a personal order on *John Dale* to pay that sum into Court.

Davey, Q.C., and *W. W. Cooper*, for the Plaintiff:—

We submit that the defaulting executor should not be allowed costs. The costs of both executors should be apportioned: *Re*

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(1) Law Rep. 18 Eq. 680.

Colquhoun (1); and the apportioned costs of the defaulting executor set off against the debt due from him.

[They were stopped by the Court.]

Ince, Q.C., and *B. B. Swan*, for *George* and *John Dale*:—

No complaint is made against *George Dale*, and he is, therefore, entitled to be recouped out of the estate all the costs and expenses properly incurred by him. Since he is equally liable with *John Dale* for the whole of the costs incurred by them to their solicitor under their joint retainer, he can only be recouped by allowing him and his co-executor their costs in full. Why should he lose part of his costs because he appeared by the same solicitor as his co-executor, when his only object in so doing was to save the estate the cost of a separate appearance? In *Watson* v. *Row* (2), which was a case on all fours with this, Vice-Chancellor *Hall* held that the solvent executor was entitled to be paid out of the estate all the costs to which he was liable under his joint retainer with his insolvent co-executor, on the ground that to deprive the solvent executor of the costs for which he was liable would be contrary to the rule of the Court, which always gives a trustee his costs unless he has behaved improperly. His Lordship distinguished that case from *Re Colquhoun* and *Harmer* v. *Harris* (3), pointing out that in the former case there did not appear to have been a joint retainer, and that in the latter one of the Defendants was an executor, and the others, who had retained the same solicitor jointly with the executor, were not. Moreover, the testator, in appointing his debtor an executor, did not intend that he should pay his costs of administration out of his own pocket. At any rate, the costs incurred subsequently to our co-executor's bankruptcy should be allowed in full.

W. C. Renshaw and *E. Cutler*, for other parties.

JESSEL, M.R.:—

I feel no difficulty about the question in this case. The facts are that two executors appeared by the same solicitor, and it turns out that one of them has received money belonging to the estate, and has made default in paying it over. The other executor had nothing to do with the receipt of the money, and is not liable for it. If there had been no question of default in the case, or if the executor who is not a debtor to the estate had appeared separately, he would clearly have been entitled to all his costs. But the defaulting executor would have been entitled to no costs until he had made good his default. That would be the strict punishment inflicted on him for his default. No doubt the Court recognises the rule by which he is allowed to set off his costs against the sum due from him, and thus make payment by anticipation. But the result either way is to deprive him while he is in default of the whole or a part of his costs.

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(1) 5 D. M. & G. 35. 17/Jan (2) Law Rep. 18 Eq. 680.

409. (3) 1 Russ. 155.

Now take the case of the executors appearing together. You apply the same rule by knocking off the costs of the defaulting executor, leaving it to the Taxing Master to say what is the proper amount. It is left to him, on taxation, to say what is the fair amount of costs to be attributed to the defaulting executor. I should have thought there was no doubt about the rule. But it has been argued that if one of the executors is not a defaulter, he is to get not only his own costs, but, besides that, all the costs of his co-executor. That would, in fact, be giving the solicitor the costs of the man who has made default. Then it has been said that a testator may, if he pleases, appoint his debtor an executor. No doubt; but how that can make any difference, I do not understand. If the solvent executor appears by the same solicitor as the defaulter it is his own fault or misfortune. He ought to have appeared separately, as he would have been not only justified in doing, but entitled to do. His failing to do that cannot affect the rights of the beneficiaries of the trust fund.

Then as to the authorities. I will only cite two. The first is *Harmer* v. *Harris* (1). It was an administration suit, in which the parties would, under ordinary circumstances, have been entitled to have their costs out of the estate; but some of the parties being indebted to the estate, and not being in solvent circumstances, the question arose whether they were entitled to their costs. This is how the question was dealt with by the

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(1) 1 Russ. 155.

Master of the Rolls, Lord *Gifford*. He said (1): "The plaintiffs are indebted to this testator's estate in upwards of £170; and they ask, before they have paid in that sum, that they may receive the costs, to which they are entitled, out of the fund in Court. If I were to grant this demand, I should be going far beyond what any decided case authorizes me to do. These parties cannot receive their costs while they continue debtors to the estate." That was right. Then, it afterwards appeared that the same solicitor had acted in the suit for several defendants, of whom one was an executor entitled to be paid his costs, and the others were debtors to the estate; and a question arose whether, under the description of "costs of the executor," the solicitor would have a right to receive out of the fund the whole amount of charges which had been incurred for the executor jointly along with some of the co-defendants, in the same manner as if he had appeared for the executor alone. Lord *Gifford* said: "Much of the costs may have been incurred for these defendants jointly . . . The costs of the executor are only that proportion of the costs due to the solicitor, with which the latter, as between the co-defendants for whom he acted, could have charged the executor." In other words, he decided that in such a case the Court disallows a part of the costs, leaving it to the Taxing Master to decide how much is to be given to the party who gets his costs.

23 Ch D
199.

The other case is that of *Watson* v. *Row* (2). The head-note is as follows: "Two executors, defendants in a suit, gave a joint retainer to a firm of solicitors. In the course of the proceedings it was certified by the Chief Clerk that one executor, who had since died insolvent, was indebted to the testator's estate. Held, that the surviving executor was entitled to be paid out of the estate all the costs for which he was liable, and that the costs incurred for the deceased executor in taking the account of his debt must be set off against the sum found due from him." Now, if the decision had not been that the surviving executor should have all those costs, it would have been quite right; but it was wrong because it gave him all the costs for which he had made himself liable. The Vice-Chancellor in his judgment said (3): "The

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(1) 1 Russ. 157.

(2) Law Rep. 18 Eq. 680.

(3) Law Rep. 18 Eq. 682.

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case before the Court is that of two executors employing a firm of solicitors on a joint retainer; and of a surviving executor who by reason of the joint retainer is liable to pay the whole of the costs which have been incurred to that firm of solicitors in respect of the business done in the suit; and it has been contended that because the co-executor happened to become insolvent and could not pay a balance due from him, therefore the solvent executor is only to be allowed one half of the costs, and to be left to pay the other half out of his own pocket. That contention appears to me to be against the principle which this Court has always acted upon, viz., that a trustee must be allowed the whole of the costs which he is liable to pay to his solicitors in the suit." With the greatest respect to the Vice-Chancellor, I cannot hold that a trustee is necessarily entitled to be allowed out of the fund all the costs which he is liable to pay. He is entitled to be allowed those which he has himself incurred as trustee, but not those which he has incurred as a surety for his co-trustee. The effect of allowing him the latter costs would be to give them twice over.

Consequently, in the present case, as regards the costs incurred before the bankruptcy, *George* and *John Dale's* costs must be distinguished, and the former will have only his proportion of the costs out of the fund. The Taxing Master will decide what that proportion is. *John Dale's* costs must be set off against the amount due from him. The costs incurred subsequently to the bankruptcy will be allowed in full.

Solicitors: *Saffery & Huntley*; *G. C. Sherrard.*

G. I. F. C.

In re WORTH.

M. R.

1881

Feb. 15.

Practice—County Court—Administration Action—Costs—Solicitor and Client—Taxation—Jurisdiction of High Court—Attorneys and Solicitors Act, 1843 (6 *&* 7 *Vict. c.* 73), *s.* 37—*County Courts Act*, 1856 (19 *&* 20 *Vict. c.* 108), *ss.* 35, 36—*Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 16—*County Courts Act*, 1875 (38 *&* 39 *Vict. c.* 50), *s.* 8—*County Courts Rules,* 1875, *Order* XXXVI., *r.* 1.

By the combined operation of the *Attorneys and Solicitors Act*, 1843 (6 & 7 Vict. c. 73), s. 37, and the *Judicature Act*, 1873, s. 16, as modified by the *County Courts Act*, 1856, s. 36, the costs as between solicitor and client in a County Court action in which the claim exceeds £20 may be taxed in the High Court of Justice: consequently, the costs as between solicitor and client in a County Court administration action may be taxed in the Chancery Division.

ONE *Worth* had acted as solicitor for *J. F. Kershaw* in an administration action on the Equity side of the County Court of *Saddleworth*, in *Yorkshire*.

On the 24th of May, 1880, *Worth* delivered to *Kershaw* his bill of costs and disbursements, and *Kershaw* subsequently presented a petition of course to the Master of the Rolls asking for the taxation of the costs in the Chancery Division.

The question was whether the High Court of Justice has jurisdiction to tax the costs of a County Court administration action.

Farwell, for *Kershaw :—*

I ask that the common order to tax may issue. A difficulty has arisen in the order of course office as to whether such an order can issue, or whether the exclusive jurisdiction to tax the costs is not given to the Registrar of the County Court.

By sect. 37 of the *Attorneys and Solicitors Act*, 1843 (6 & 7 Vict. c. 73), the High Court of Chancery had jurisdiction to tax the costs of any bill where the business "contained in such bill or any part thereof shall have been transacted in the High Court of Chancery, or in any other Court of Equity."

The jurisdiction of the Court of Chancery is now by the Judicature Acts vested in the High Court of Justice, and by reason of the equity jurisdiction conferred on the County Courts they are Courts of Equity within the above words: consequently a bill for equity business transacted in a County Court may now be taxed in the High Court.

The jurisdiction conferred by the *Attorneys and Solicitors Act* is, moreover, as I submit, not taken away by the subsequent County Courts Acts, except in certain instances. Sect. 35 of the *County Courts Act*, 1856, is the only section dealing with solicitor and client costs where the claim in the action exceeds £20. Such costs are, on the application of the solicitor or client, "but not otherwise," to be taxed by the Registrar, subject to review by the Judge; and there is a provision at the end of the section that no solicitor shall have a right to recover any costs unless they have been allowed either on such taxation "or on the taxation of a master of a superior Court of Common Law, or of the Court of Chancery."

I submit that sect. 35 does not take away the jurisdiction to tax given to the Court of Chancery by the *Solicitors Act*, but, on the contrary, that that section rather confirms the jurisdiction. The next section (sect. 36) may be said to give the exclusive jurisdiction to tax the costs of an action in which the claim does not exceed £20 to the Registrar of the County Courts, for no costs can be allowed in such action except those mentioned in sect. 91 of the *County Courts Act*, 1840, unless upon a taxation the Registrar is satisfied that the client has agreed in writing to pay further costs and charges, when he may allow such further costs and charges.

Then, by the *County Courts Act*, 1875, s. 8, the County Court Judges therein mentioned have power to frame a scale of costs with respect to all proceedings in the County Court, and such scale, when approved of by the Lord Chancellor, is to be binding. Under that section, and the previous power to frame rules of practice given to the Judges by sect. 32 of the *County Courts Act*, 1856, the County Courts Rules of 1875 have been framed, and are now the only rules in force regulating the practice of the County Courts. By Order XXXVI., rule 1, of these Rules "all costs shall be taxed by the Registrar of the Court, subject to the review of such taxation by the Judge." That rule, however, I submit, only

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deals with such costs as are under the County Courts Acts to be taxed in the County Court, and cannot take away the existing jurisdiction of the superior Courts to tax in actions in which the claim exceeds £20.

JESSEL, M.R.:—

Under the *Attorneys and Solicitors Act*, 1843, and the *Judicature Act*, 1873, an order for taxation of costs in any Court may be made by any Judge of the High Court of Justice, the jurisdiction conferred by sect. 37 of the former Act being now transferred by sect. 16 of the *Judicature Act*, 1873, to the Judges of the High Court. The only question then is whether that jurisdiction has been taken away or modified so far as regards costs in a County Court: it can only be taken away by plain words. Sect. 36 of the *County Courts Act*, 1856, limits costs in all actions in a County Court where the claim does not exceed £20, and provides for their allowance only upon taxation by the County Court Registrar. That section, it seems to me, excludes the jurisdiction of the High Court where the claim does not exceed £20.

Now as to solicitor and client costs in County Court actions exceeding £20, the Registrar does not tax them as a matter of course; for under sect. 35 they are to be taxed by the Registrar only "on the application either of the attorney or client," and they cannot be recovered "unless they shall have been allowed either on such taxation or on the taxation of a master of a superior Court of Common Law, or of the Court of Chancery;" thus recognising the jurisdiction to tax in the superior Courts where no application is made to the Registrar. That being so, sect. 35 does not appear to me to take away the jurisdiction of the High Court of Justice to tax solicitor and client costs in a County Court action, where the claim is for more than £20. All costs in the County Courts are now regulated by the scale of costs framed under the *County Courts Act*, 1875, s. 8. The Acts of 1856 and 1875 give the County Court Judges power to frame rules for the regulation of the practice of their own Courts, and to frame a scale of costs in all proceedings in such Courts; and by Order XXXVI., rule 1, of the County Court Rules, 1875, the Judges have directed that all costs are to be taxed by the Registrar of the Court. The

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only power, however, given to the County Court Judges is to regulate the proceedings and practice in their own Courts, and therefore under that power they cannot, in my opinion, repeal the previous jurisdiction to tax the costs conferred on the superior Courts by the *Attorneys and Solicitors Act*, 1843.

In my opinion, therefore, the High Court of Justice has now jurisdiction to direct the taxation of these costs, and an order of course for that purpose must issue.

Solicitors: *Pritchard, Englefield, & Co.*

G. I. F. C.

M. R.
1881
March 7.

In re LECHMERE AND LLOYD.

[1881 L. 272.]

Will—Life Estate—Contingent Remainder—Executory Devise—Devise to such Children of Tenant for Life "as either before or after her decease" should attain twenty-one or marry.

21 Ch D 793
24 Ch D 633–5

A testatrix devised a freehold estate to her granddaughter *E.* during her life, and from and after her death to such of her children living at her death "as either before or after her decease" should, being males, attain twenty-one, or, being females, attain that age or marry, in fee simple as tenants in common: and if there should be no such child, then over.

E. survived the testatrix, and died leaving seven children, of whom five had attained twenty-one at the time of her death, and two, a son and a daughter, were infants, the daughter being also a spinster:—

Held, that the five children took vested interests liable to open to let in the two other children on their fulfilling the conditions of the will.

Brackenbury v. *Gibbons* (1) not followed.

ADJOURNED SUMMONS.

Elizabeth Williams, widow, being seised of a farm called *Pistill*, in the county of *Radnor*, by her will, made in 1846, shortly before her death, devised the same as follows:—

"I give and devise the said farm, lands, and hereditaments, unto and to the use of my granddaughter, *Elizabeth Eckley*, and her assigns during her life, without impeachment of waste; and from and after her decease I give and devise the same to such children of the said *Elizabeth Eckley* living at her death, and such issue then living of her children then deceased, as either before or after her decease shall, being a male or males, attain the age of twenty-one years, or, being a female or females, attain that age or marry, in fee simple, to take, if more than one, as tenants in common, according to the stocks, and not according to the number of individuals; and if there shall be no such children or issue," then over.

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(1) 2 Ch. D. 417.

Elizabeth Eckley married *Thomas Lechmere*, and died in 1879, leaving seven children, of whom five had attained twenty-one at the time of her death, and two, a son and a daughter, were infants, the daughter being also a spinster.

There was no issue of any deceased child.

The five adult children having entered into a contract for the sale of the farm, the question arose, upon an objection by the purchasers, whether these five children could make a good title to the entirety of the property; and whether all the seven children did not take vested interests in remainder as tenants in common, subject, as to the shares of the two infant children, to be divested in case of their dying under age.

The question was raised for the opinion of the Court upon a summons taken out by the purchasers under the *Vendor and Purchaser Act*, 1874.

Snape, for the purchasers:—

I submit that the whole of the children took vested interests at birth, subject to be divested in case of their not surviving the tenant for life and not attaining twenty-one, or, being daughters, attaining that age or marrying: *Doe* v. *Hopkinson* (1); *Riley* v. *Garnett* (2). In *Muskett* v. *Eaton* (3) your Lordship held that the words "attain the age of twenty-one years" were not part of the description of the devisee, so as to bring such a case within the rule in *Festing* v. *Allen* (4), where it was held that a gift to "such children of *A*. as shall attain twenty-one" created a contingent remainder, which failed as to those children who had not attained twenty-one when the preceding life estate determined. It is an established rule, as laid down in *Duffield* v. *Duffield* (5), "that all estates are to be holden to be vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the Courts cannot treat them as vested without deciding in direct opposition to the terms of the will." In *Andrew* v. *Andrew* (1) a testator devised lands to *T.* during his life, and from and after his decease unto his eldest son if he should have arrived at the age of twenty-one years, and, in default of his having a son, then over. The legal estate was outstanding. *T.* died leaving an eldest son, a minor. It was held by the Court of Appeal, reversing the decision of Vice-Chancellor *Hall*, that on the death of *T.* the eldest son took an estate in fee, liable to be divested on his death under twenty-one. Though that was a case of an equitable estate, there seems no good reason why the same construction should not be adopted where the devise is, as in the present case, of the legal estate.

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(1) 5 Q. B. 223.

(2) 3 De G. & Sm. 629.

(3) 1 Ch. D. 435.

(4) 12 M. & W. 279.

(5) 1 Dow. & Cl. 268; 3 Bl. (N.S.) 260.

[He also referred to *Hawkins* on Wills (2).]

He was stopped by the Court.

Grosvenor Woods, for the vendors:—

I submit that the rule is now established that where there is a devise to *A.* for life, and after his death to such of his children as shall attain twenty-one, that is a remainder contingent on the children attaining twenty-one in the lifetime of *A.*; and that if any of the children have not attained twenty-one at the time the particular estate fails by the death of *A.*, the remainder fails as to those children: *Festing* v. *Allen* (3); *Holmes* v. *Prescott* (4); *Rhodes* v. *Whitehead* (5).

[JESSEL, M.R.:—In those cases the devise was simply to the children "who shall attain twenty-one," but here the devise is to such children "as either before *or after* the decease" of the tenant for life shall attain twenty-one, &c.]

These very words occurred in *Brackenbury* v. *Gibbons* (6), where Vice-Chancellor *Hall* held that such of the children as had not attained twenty-one at the death of the tenant for life were excluded, on the ground that the law as to executory devises did not apply to such a limitation as that.

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(1) 1 Ch. D. 410.
(2) Pages 237–242.
(3) 12 M. & W. 279.
(4) 10 Jur. (N.S.) 507; 12 W. R. 636.
(5) 2 Dr. & Sm. 532.
(6) 2 Ch. D. 417.

[JESSEL, M.R.:—In *Brackenbury* v. *Gibbons* (1) the gift was, in reality, to two classes of children, children who should attain twenty-one before the death of the tenant for life, and children who should attain twenty-one after the death. The second class could by no possibility be ascertained at the determination of the preceding estate, so that that class, which was as much an object of the testator's bounty as the first, could only take by executory devise. That point seems to have been missed both in the argument and judgment.]

I submit that the words here only amount to a definition of a class of persons, and that the mere possibility of some of the class not attaining twenty-one until after the death does not prevent the vesting as to those who had attained twenty-one at the death, to the exclusion of those who might attain twenty-one after. In *Brackenbury* v. *Gibbons* the Vice-Chancellor said that, looking at *Holmes* v. *Prescott* (2) and *Rhodes* v. *Whitehead* (3), the law must be considered settled as to a gift of this kind.

JESSEL, M.R.:—

I am sorry there is a report of such a case as *Brackenbury* v. *Gibbons*, because I am not aware of any other case in which the words we have here occur, and I cannot now say what I otherwise should have said had there been no such reported case. But, with all respect, I must say this, that the real point does not appear to have been taken by Vice-Chancellor *Hall* in *Brackenbury* v. *Gibbons*, for he fails to point out that the devise in that case, so far as it related to children who had not attained twenty-one when the particular estate determined, could really only take effect as an executory devise and not as a remainder at all. He seems to have relied upon *Holmes* v. *Prescott* and *Rhodes* v. *Whitehead*, but those were different cases altogether, for there the words "or after" the death, which were in *Brackenbury* v. *Gibbons* and which we have here, did not occur. The

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(1) 2 Ch. D. 417.

(2) 10 Jur. (N.S.) 507; 12 W. R. 636.

(3) 2 Dr. & Sm. 532.

Vice-Chancellor says that "Every gift which can take effect as a remainder absolutely excludes its being treated as an executory devise." I agree, that is the rule; but I am at a loss to see how the devise in that case or this could take effect as a remainder. The rule is that a remainder must be capable of taking effect when the preceding estate determines. Now what is the gift here: it is this:—[His Lordship then read the clause of the will above stated, and continued:—] The rule being as stated by Vice-Chancellor *Hall*, that every gift which can take effect as a remainder absolutely excludes its being treated as an executory devise, how is it possible to construe such a gift as this—"to such children of the said *Elizabeth Eckley* living at her death as either before or after her decease shall, being a male or males, attain the age of twenty-one years, or, being a female or females, attain that age or marry, in fee simple"—as a gift that can take effect as a remainder as to those children who had not complied with the conditions of the will before the death of the tenant for life? It is impossible. It cannot take effect as a remainder as regards those children who attain twenty-one or marry after the death of the tenant for life; for the class to take under the gift to children who attained twenty-one or married after the death could not possibly be ascertained during the lifetime of the tenant for life. Where the gift is to a class which can by no possibility be ascertained at the determination of the preceding estate of freehold, the class can only take on the footing of its being an executory devise. What ground is there for cutting down the devise and saying that only those who had attained twenty-one or married at the death of the tenant for life were to take?

If the devise be to *A.* for life, and after her death simply to a class of children who shall attain twenty-one or marry, I agree that those members of the class who have not attained twenty-one or married at the death of the tenant for life, though they may do so afterwards, cannot take, according to the rule in *Festing* v. *Allen* (1); but here we have two distinct classes as the objects of the devise, the one being children living at the death of the tenant for life and attaining twenty-one or marrying *before* the death, and the other being children living at the death and attaining twenty-one or marrying after the death. There are two children who were living at the death of the tenant for life, but are at present under age: why should they not, upon their fulfilling the conditions of the will, participate in the testatrix's bounty equally with the other children who had fulfilled those conditions in the lifetime of the tenant for life? But to enable the second class to participate it is necessary to read the gift to them as an executory devise. The rule is that you construe every limitation, if you possibly can, as a remainder, rather than as an executory devise. It is a harsh rule: why should I extend it? Why should a gift which cannot possibly take effect as a remainder not take effect as an executory devise? I see no good reason why it should not.

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(1) 12 M. & W. 279.

The result is, in my opinion, that the devise in this case could not take effect as a remainder in respect of those children who survived the tenant for life but had not attained twenty-one at her death, and must, therefore, in order to let in those children, be construed as an executory devise. Consequently the five children who have attained twenty-one take vested interests liable to open to let in the two infant children on their fulfilling the conditions of the will; and I am therefore of opinion that the five children who attained twenty-one in the lifetime of the tenant for life cannot now make a good title to the entirety of the property.

Solicitors: *Parkin, Pagden, & Woodhouse; Guscotte, Wadham, & Daw.*

G. I. F. C.

M. R.
1881
March 14.

In re MUTUAL SOCIETY.
GRIMWADE *v.* MUTUAL SOCIETY.

[1879 G. 259.]

Company—Winding-up—Representative Case—Costs.

In a representative case for the opinion of the Court in the winding-up of a company, the costs of the parties will be allowed out of the estate as between party and party only, and not as between solicitor and client.

Part's Case (1) not followed on this point.

ADJOURNED SUMMONS.

This was a summons, under the 101st section of the *Companies Act*, 1862, by the official liquidator of the *Mutual Society*, now in course of being wound up, for payment by the borrowing members of the amounts secured by the bonds executed by them in favour of the society.

Questions having arisen as to the extent of the liability of the different classes of borrowing members, the case of one member of each class had been selected, with the sanction of the Chief Clerk, as a representative case upon which to take the opinion of the Court.

The only question calling for a report was whether, in a representative case in the winding-up of a company, the costs of both parties should be allowed out of the estate as between solicitor and client, or only as between party and party.

Chitty, Q.C., and *Burton Buckley*, for the liquidator.

Davey, Q.C., and *Whitehorne*, for the borrowing members, submitted that the costs of both parties should be allowed as between solicitor and client: *Part's Case* (1).

JESSEL, M.R.:—

I am not inclined to establish any such rule as that in a representative case in a winding-up the costs of both parties should be allowed as between solicitor and client. If a shareholder is suing

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(1) Law Rep. 10 Eq. 622.

M. R.
1881
In re MUTUAL SOCIETY.
GRIMWADE *v.* MUTUAL SOCIETY.

on behalf of himself and all the other shareholders, or a creditor is suing on behalf of himself and all the other creditors, he does not get costs as between solicitor and client. I shall certainly not establish any such rule as is suggested: it is entirely contrary to the whole practice of the old Court of Chancery.

I shall only allow party and party costs.

Solicitors: *Linklater, Hackwood, & Co.*; *Munns & Longden.*

G. I. F. C.

SMITH *v.* LUCAS.

[1881 S. 1404.]

M. R.
1881
May 30.

Married Woman—Infant—Marriage Settlement—Separate Estate—Restraint on Anticipation—Covenant to settle after-acquired Property—Existing Property—Voidable Covenant—Election.

22 Ch D 264
266-7
8 App Cas
422-7

An agreement by husband and wife, in an antenuptial settlement, for the settlement by the husband and wife of the wife's after-acquired property, is a covenant by the wife as well as by the husband, whether the wife is a minor or of full age. If the wife is a minor, and the covenant is for her benefit, it is voidable only and not void, and is binding upon all property coming to her during the coverture for her separate use, without a restraint on anticipation, until she avoids or disaffirms the covenant as to such property; for she may, after attaining twenty-one, and during the coverture, elect whether the covenant shall be binding on her separate estate or not, such right of election being a necessary consequence of a married woman's power to dispose of, without her husband's consent, property settled to her separate use: but—inasmuch as a contract by a married woman, while under coverture, affecting her separate property binds only her then existing separate property, and not separate property which she may thereafter acquire (1)—the wife, in electing to confirm the covenant, thereby binds only that separate property to which she is entitled at the date of the confirmation, and not that to which she may subsequently become entitled during the coverture.

Semble, the doctrine of election or compensation does not apply in the case of a married woman entitled for her separate use with a restraint on anticipation.

Willoughby v. *Middleton* (2) questioned on this point.

By an antenuptial settlement, dated in 1856, the lady being then a minor, after reciting that she would be entitled on attaining twenty-one to a share of her deceased father's estate, and the intention to settle the same, it

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(1) *Pike* v. *Fitzgibbon*, 17 Ch. D. 454.

(2) 2 J. & H. 344. 8 Jur N.S. 1055.

M. R.
1881
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v.
LUCAS.

was agreed and declared between the parties thereto, and the husband covenanted with the trustees, that the husband and wife and all other necessary parties would, as soon as the wife attained twenty-one, convey the share to the trustees upon trust for the wife during her life for her separate use without power of anticipation, and after her death for the husband till bankruptcy or alienation, with remainder for the issue of the marriage. And it was further agreed and declared that if the wife then was, or if at any time or times during the coverture she or her husband in her right should become seised or possessed of or entitled to any real or personal property for any estate or interest whatsoever, then and in every such case the husband and wife and all other necessary parties should assure the same to the trustees upon the trusts thereinbefore declared. The settlement contained a power for the trustees, at the request of the wife, to lend any of the trust funds to the husband on his personal security.

The wife attained twenty-one in 1857, and in 1858 she and her husband, in pursuance of the covenant in that behalf in the settlement, conveyed her share of her father's estate to the trustees of the settlement.

In 1863, upon the death of a brother, the wife became entitled under his will to certain funds thereby bequeathed to her for her separate use. These funds, and also funds arising from her share of her father's estate, were, with the assent of the wife, paid to the trustees of the settlement and by them lent, at her request, to the husband on his personal security.

In 1880 the wife became entitled under the will of her mother to a sum of £4000, and a share of her residuary estate thereby bequeathed respectively to her for her separate use:—

Held, that the wife could elect to retain the £4000 and share of residue for her separate use unbound by the covenant for the settlement of her after-acquired property.

DEMURRER to statement of claim.

The statement of claim alleged as follows:—

By an indenture dated the 3rd of September, 1856, and made and executed by and between the Defendant, *William Smith*, of the first part, the Defendant, *Catherine Smith*, then *Catherine Lucas*, spinster, of the second part, the seven brothers and sisters of the said *Catherine Lucas* of the third part, and *Charles Hardcastle Abbot* and the Plaintiff, *Thomas Smith*, of the fourth part (being the settlement made prior to the marriage of the said *William Smith* and *Catherine Lucas*); after reciting that by virtue of the will and codicils of *Thomas Lucas*, deceased, the father of the said *Catherine Lucas*, his real and personal estate was devised and bequeathed to trustees upon trust, subject to an annuity to his wife, *Jemima Lucas*, for all his children equally, namely, the said *Catherine Lucas* and her said seven brothers and sisters, to be payable to them respectively on their respectively attaining the age of twenty-four years, and that the testator directed that the income of the shares of such of them as should not at the time of his death have attained the age of twenty-four years should be paid and applied by his said trustees for their maintenance and support respectively, and that in case either of his said children should die under the age of twenty-one years the share or shares of such of them so dying should be divided equally among the survivors of them: and also reciting that all the said children of the said testator had attained the age of twenty-one years except the said *Catherine Lucas*, who was then of the age of nineteen years: and also reciting the said then intended marriage between the said *William Smith* and *Catherine Lucas*, and that upon the treaty for the said marriage it was agreed that the said *William Smith* should enter into the covenant thereinafter contained for payment to the said *Charles Hardcastle Abbot* and *Thomas Smith* of the sum of £2000 and interest to be held by them upon the trusts thereinafter declared concerning the same: and also reciting that upon the treaty for the said then intended marriage it was also agreed that the share to which the said *Catherine Lucas* then was or to which she or the said *William Smith* in her right should, upon her attaining the age of twenty-one years, or at any other time, become entitled under the said will and codicils of the said *Thomas Lucas* of and in the real and personal estate thereby devised and bequeathed, should be settled in manner thereinafter expressed, and that the said *William Smith* should enter into the covenant for that purpose thereinafter contained: and also reciting that to give effect to the intended settlement the several parties thereto of the third part had agreed to join in the now stating indenture in manner thereinafter appearing: it was witnessed that in pursuance of the said agreement and in consideration of the said then intended marriage, the said *William Smith* thereby covenanted with the said trustees for payment to them, within six calendar months after the solemnization of the marriage, of the sum of £2000 and interest. And it was also witnessed that, in pursuance of the said agreement and in consideration of the said then intended marriage, "it was thereby agreed and declared between and by the said parties thereto, and particularly the said *William Smith*, so far as related to his own acts, deeds and defaults, did thereby for himself, his heirs, executors, and administrators covenant with the said trustees, their executors and administrators," that, in case the marriage should take effect, "the said *William Smith* and *Catherine Lucas*, and all other necessary parties," would, as soon as the said *Catherine Lucas* should attain twenty-one, or as the case would admit of, grant and assign unto and to the use of the trustees the one equal undivided eighth share or other the share or shares to which, by virtue of the said will and codicils of the said *T. Lucas*, the said *Catherine Lucas* was then entitled, or to which, by virtue of the same will and codicils, she or the said *William Smith* in her right should become entitled in the event of her attaining twenty-one, or otherwise, of and in the real and personal estate thereby devised and bequeathed, to be held by the said trustees upon the trusts thereinafter declared concerning the same. Then followed a release by the said parties thereto of the third part to the trustees of their respective interests by survivorship in the share of the said *Catherine Lucas* expectant upon her dying under twenty-one. And it was thereby agreed and declared that the said trustees should stand seised of the real estate granted or to be granted to them in pursuance of the said covenant of the said *William Smith* upon trust for sale as therein mentioned, and hold the proceeds upon the trusts thereinafter declared concerning the same; and should stand possessed of the said sum of £2000 and interest secured by the said covenant of the said *William Smith*, and the personal estate assigned or to be assigned to them in pursuance of his said covenant, and also the proceeds of sale of the said real estate from and after the solemnization of the marriage, upon trust either to permit the said sum of £2000 and the said personal estate to remain in their actual states of investment, or, with such consents or at such discretion as therein mentioned, to call in the said £2000 and sell and convert the said personal estate; and should, with such consent or at such discretion as aforesaid, invest the said £2000 and the proceeds of the sale and conversion of the said real and personal estate in the securities therein mentioned, and pay the income of the said trust moneys and securities "unto the said *Catherine Lucas* during her life for her separate use without power of anticipation," and after her death to the said *William Smith* till bankruptcy or alienation; and, subject to the trusts aforesaid, should stand possessed of the trust funds upon certain trusts for the benefit of the children or more remote issue of the marriage. "And it was thereby further agreed and declared that if the said *Catherine Lucas* then was, or if, at any time or times during the said then intended coverture, she, or the said *William Smith* in her right, should become seised or possessed of or entitled to any real or personal property of the value of £200, or upwards, for any estate or interest whatsoever (except jewels, &c.), then and in every such case the said *William Smith* and *Catherine Lucas*, and all other necessary parties, should, at the cost of the trust estate, as soon as circumstances would admit, and to the satisfaction of the said trustees or trustee for the time being, convey, assign, and assure the said real and personal property to, or otherwise cause the same to be vested in, the said trustees or trustee for the time being," upon trust for sale, and to stand possessed of the proceeds upon the trusts thereinbefore declared of the moneys to arise from any sale in pursuance of the trust for sale thereinbefore contained, and the investments thereof. The settlement contained a power for the trustees to allow the £2000 to remain on the security of the husband's covenant during his life, and, at the request of the wife, to lend any of the trust funds to the husband upon his personal security.

The marriage of Mr. and Mrs. *Smith* was duly solemnized the day after the date of the settlement.

Mrs. *Smith* attained twenty-one on the 3rd of November, 1857.

By an indenture dated the 30th of March, 1858, and made and executed by and between Mr. and Mrs. *Smith* of the one part, and the trustees of the marriage settlement of the other part, and duly acknowledged by Mrs. *Smith*, Mr. and Mrs. *Smith*, in pursuance of the covenant in that behalf contained in the settlement, granted and assigned to the trustees the one equal undivided eighth share, and all other (if any) the share to which under the said will and codicils Mrs. *Smith*, or she and her husband in her right, or either of them, was or were then entitled or should become entitled of and in the real and personal estate thereby devised and bequeathed, to hold unto and to the use of the trustees, their heirs, executors, administrators, and assigns, upon the trusts declared concerning the same by the settlement, "to the intent that the said hereinbefore stated indenture and the settlement intended to be thereby made might be confirmed in every respect."

On the 23rd of March, 1858, one of Mrs. *Smith's* sisters died, having by will bequeathed to her, but not for her separate use, a legacy of £500 and a share of her residuary estate.

In July, 1863, *Edward Thomas Lucas*, a brother of Mrs. *Smith*, died, having by will bequeathed to her a legacy of £1500, a share of his residuary estate, and a reversionary interest in a share of a sum of £3500, with a declaration that any legacy or share payable to any married woman under his will should be enjoyed and disposed of as her separate property free from marital control.

The trustees of the settlement, with Mrs. *Smith's* assent, ultimately received large sums of money on account of her one eighth share under her father's will, also the legacy of £500 and share of residue bequeathed to her (but not for her separate use) by her sister, also the legacy of £1500 and share of residue bequeathed to her for her separate use by her brother, and, upon its falling into possession in 1867, her reversionary share bequeathed by him to her for her separate use of the said £3500. All the moneys so received by the trustees were, at Mrs. *Smith's* request, from time to time advanced by them to Mr. *Smith* on his personal security, as authorized by the settlement.

Mrs. *Smith's* mother, *Jemima Lucas*, the widow of the testator, *Thomas Lucas*, died in June, 1880, having by her will, dated in May, 1878, in pursuance of a power given to her by her marriage settlement, appointed a sum of £2000 equally between her four surviving children, of whom Mrs. *Smith* was one. And she devised and bequeathed all her real estate and the residue of her personal estate to her son, the Defendant, *John Frederick Lucas*, and her daughter, Mrs. *Smith* (whom she appointed her executor and executrix), upon trust to sell the same and thereout to pay to Mrs. *Smith* the sum of £4000 for her separate use, and upon further trust to pay and transfer the residue of her estate to Mrs. *Smith* for her separate use.

None of the property appointed or bequeathed to Mrs. *Smith* by her mother's will had yet been received by the trustees of the settlement. It was admitted by Mrs. *Smith* that as her one fourth share of the £2000 so appointed by her mother's will was not appointed to her separate use, it was subject to the trusts of her marriage settlement; but she alleged that inasmuch as her mother had given the £4000 and her residuary estate, which, it was said, would amount to upwards of £3000, to her for her separate use, neither of those sums was subject to the trusts of the settlement, but that she was entitled to retain the same for her separate use, and to deal therewith as she should think fit.

Mrs. *Smith* was also entitled for her separate use under the said will of her brother *Edward Thomas Lucas* in reversion expectant on the death of his widow, to one sixth share of a sum of £12,000 thereby bequeathed, and this share Mrs. *Smith* likewise alleged would not become subject to her settlement in case it fell into possession during the coverture.

The Plaintiff, who was the surviving trustee of the settlement, insisted that Mrs. *Smith* had, by executing the deed of confirmation of the 30th of March, 1858, and by consenting to the payment of the said several legacies which had been bequeathed to her by her brother for her separate use to the trustees of the settlement and to the application thereof by them under the settlement, elected to take under and be bound by the settlement, and that the Plaintiff was entitled, as surviving trustee of such settlement, to have the said legacy of £4000 and the clear residue of the estate of the testatrix, *Jemima Lucas*, paid to him to be held upon the trusts of the settlement, and that he was also entitled to receive, as such trustee, all other sums which during Mrs. *Smith's* coverture should become payable to her for her separate use.

In order to have these questions decided, *Thomas Smith*, the surviving trustee of the settlement, brought this action against *John Frederick Lucas* (co-executor with Mrs. *Smith* of her mother's will), and Mrs. *Smith* and her husband, claiming a declaration that Mrs. *Smith* had elected to take under and had duly confirmed and was bound by her said marriage settlement, and that, not only the said several legacies or sums of money to which she from time to time became entitled for her separate use, and which, at her request, were advanced by the trustees of the settlement to her

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husband upon his personal security, but also the said legacy or sum of £4000 and residuary estate respectively bequeathed to her for her separate use by her mother's will, and all such other sums of money to which she should become entitled in possession during her coverture for her separate use, were bound by the settlement: and payment of the £4000 and the amount of the residuary estate of the testatrix, *Jemima Lucas*, when ascertained, to the Plaintiff, to be held by him upon the trusts of the settlement.

Mrs. *Smith* having obtained an order to defend separately from her husband, she and her co-defendant, *John Frederick Lucas*, demurred to the statement of claim on the ground that the covenant in her marriage settlement for the settlement of her after-acquired property, was not binding on her in consequence of her infancy at the date of the settlement, and that nothing in the statement of claim mentioned had made it so binding.

Ince, Q.C., and *Maidlow*, for the demurrer:—

We submit that the covenant is not binding upon Mrs. *Smith* as regards property belonging to her for her separate use. The form is "it is hereby further agreed and declared" only, without the words "between the parties hereto" which occurred in *Willoughby* v. *Middleton* (1). There is, moreover, no recital of an intention to settle the wife's after-acquired property. Then we further submit that Mrs. *Smith* has not in any way elected that her separate property shall be bound by the settlement. To constitute election there must be knowledge of his rights on the part of the person who is said to elect, an intention to elect, and some act done by him to signify his election: *Dillon* v. *Parker* (2); but those essentials are wanting here. It does not appear that Mrs. *Smith* was aware of her rights when she assented to her separate funds being paid to the trustees of the settlement, nor is there any statement of her intention to waive those rights: and it is to be particularly observed that, though she takes the first life interest under the settlement, she has not herself derived any benefit from the funds paid to the trustees, her husband alone having had the benefit of them.

[Jessel, M.R.:—Under the trusts of this settlement Mrs. *Smith*

(1) 2 J. & H. 344. 8 Jur. N.S. 1055 (2) 1 Sw. 359.

is restrained from anticipation. Can a married woman, under the doctrine of election, get rid of a restraint on alienation?]

In *Willoughby* v. *Middleton* (1) Vice-Chancellor *Wood* put a married woman to her election as between property bequeathed to her for her separate use and property to which she was entitled under her marriage settlement for her separate use without power of anticipation, the settlement having been executed by her when a minor and containing a covenant to settle her after-acquired property: and he held that the wife could not take the benefit of the former property without making compensation out of the latter, notwithstanding her restraint on anticipation. But we submit that that decision is not sound, for it, in effect, enables a married woman to give up property in respect of which a restraint on alienation is imposed and so destroy the protection which the fetter was designed to give her. That decision is, in fact, opposed to *Robinson* v. *Wheelwright* (2), which was not cited to the Vice-Chancellor, and where the Court of Appeal distinctly held that a married woman had no right of election as between two properties one of which was subject to a restraint on anticipation, although it would have been greatly to her benefit to elect. In *Codrington* v. *Codrington* (3) and *Griggs* v. *Gibson* (4), where the doctrine of election by a married woman was considered, the point as to the effect of a restraint on anticipation did not arise. Upon principle, therefore, we submit that where a married woman is restrained from anticipation she cannot be put to her election.

Then, as to the effect of the deed of confirmation of 1858, that deed was confined to Mrs. *Smith's* share of her father's estate, and did not extend to property which she had not then acquired, or to the covenant to settle her after-acquired property. Even supposing the terms of that covenant were sufficient to make it a covenant by the wife, it was a covenant entered into by her when a minor and was therefore voidable, and nothing has yet been done to confirm it, as in *Rawlins* v. *Birkett* (5). And further, even assuming that the deed of 1858 was a confirmation of the whole

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(1) 2 J. & H. 344, 355. 8 Jur. N.S. 1055

(2) 6 D. M. & G. 535. 2 Jur. N.S. 554

(3) Law Rep. 7 H. L. 854; Ibid. 8 Ch. 578, 590, *nom. Codrington* v. *Lindsay.*

(4) Law Rep. 1 Eq. 685.

(5) 25 L. J. (Ch.) 837.

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settlement, the funds now in question could not be bound by it, as they had not been acquired by the wife at the date of the confirmation: for it has recently been held that a covenant by a married woman, while under coverture, purporting to bind her after-acquired property does not affect any separate estate to which she was not entitled at the time the covenant was entered into: *Pike* v. *Fitzgibbon* (1). The Court has no power to make a decree personally against the wife: *Aylett* v. *Ashton* (2); and this being a voidable contract she is entitled to disaffirm it and claim the right to dispose, in any manner she thinks proper, of property that belongs to her for her separate use. Not having affirmed the contract, she has not elected to be bound by it; neither can she be compelled so to elect. She cannot possibly elect so as to deprive herself of property which is in express terms subject to a restraint on alienation. As to her reversionary interest in a share of the £12,000 under her brother's will, she cannot dispose of that without a deed duly acknowledged under Vice-Chancellor *Malins'* *Act*, 20 & 21 Vict. c. 57.

Chitty, Q.C., and *Speed*, for the Plaintiff:—

We submit that these funds are bound by the covenant. First, as to the form of the covenant. An agreement in a deed that property shall be dealt with in a particular way is a covenant by the parties to the deed whose concurrence is required to give effect to the provision; and the omission of the words "between the parties hereto" is immaterial. It is clear from *Willoughby* v. *Middleton* (3), *Butcher* v. *Butcher* (4), and *Ramsden* v. *Smith* (5), that the wife's separate estate is bound by a covenant or agreement in this form.

Then, the covenant being sufficient in point of form, we submit it was a valid covenant on the part of the wife, although she was a minor at the time she entered into it, for it was a covenant clearly for her benefit; in fact it is the practice of the Court to require such a covenant to be inserted in the settlement of its wards as being for their benefit. It was therefore voidable only,

(1) 17 Ch. D. 454.

(2) 1 My. & Cr. 105, 111.

(3) 2 J. & H. 344. 8 Jur NS 1

(4) 14 Beav. 222.

(5) 2 Drew. 298, 307. 18 Jur 567

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and not void. Now, however, we submit it has become a binding covenant, for not only did she confirm it by the deed of 1858, which stated the "intent" that the settlement "might be confirmed in every respect," but she has also by her acts confirmed it, having already authorized separate estate coming to her to be handed over to the trustees of the settlement to be dealt with under its provisions. She cannot, therefore, now disaffirm the settlement. That a married woman can elect, and, having elected, will be held to her election, is decided by *Barrow* v. *Barrow* (1) and *Williams* v. *Baily* (2). And in *Brown* v. *Brown* (3), where a settlement was executed by a lady when a minor, and she died without having confirmed it, her only child and heiress-at-law, who claimed the personal estate under the settlement, but the real estate adversely to it, was put to her election whether she would take under or against the settlement.

Ince, in reply:—

I do not dispute that a married woman may be put to her election, but this is not a case in which she could elect, even if she had affirmed the covenant, inasmuch as by the settlement she is restrained from anticipation. But, the covenant being voidable, she is at liberty to disaffirm it and say that property coming to her for her separate use shall not be bound by it. She has a capacity for electing in that sense.

[*Holroyd* v. *Marshall* (4), *Earl Durham* v. *Wharton* (5), and *Sudg.* Law of Property (6), were also cited in the course of the argument.]

JESSEL, M.R.:—

The question raised by this demurrer is one of some singularity. I do not profess to entertain any doubt about it, but I have felt very much embarrassed, not by reason of any difficulty of my own, but by reason of some of the decisions, notably *Willoughby* v. *Middleton* (7), which I am not at liberty to disregard, and which imposes on the Court the task of saying to what extent the decision goes, and what points are to be considered as settled by it.

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(1) 4 K. & J. 409. 4 Jur. N.S. 1049

(2) Law Rep. 2 Eq. 731, 734.

(3) Ibid. 2 Eq. 481.

(4) 10 H. L. C. 191. 9 Jur. N.S. 213

(5) 3 Cl. & F. 146.

(6) Pages 131, 132.

(7) 2 J. & H. 344. 8 Jur. N.S. 1055

I must first consider the covenant in this case. The settlement is one which I cannot help thinking was never intended by the framer of it to have the effect I am going to attribute to it; but, of course, as I very often say, one must consider the meaning of the words used, not what one may guess to be the intention of the parties.

It seems that a Mr. *William Smith* being about to marry a lady of the name of *Catherine Lucas,* who was an infant, a settlement was made, dated the 3rd of September, 1856. It first recites that under the will of the lady's father she was entitled, on attaining a certain age, to a share of his real and personal estate: then an agreement that the husband should covenant for payment of a sum of money to be settled; then an agreement that what the lady should upon her attaining twenty-one, or at any other time become entitled to under the will of her father, should be settled, and so on; and then comes the witnessing part. There is no recital of any intention to settle future-acquired property in general. The witnessing part is this: first, the husband covenants to pay the £2000: then it was thereby agreed and declared between and by the parties thereto, and particularly *Smith,* the husband, so far as related to his own acts, deeds, and defaults, did thereby for himself, and so forth, covenant with the trustees that he and *Catherine Lucas* and all other necessary parties should and would as soon as she should attain twenty-one grant and assign to the trustees her share under her father's will: and then, in a subsequent part of the deed, there is a further covenant extending to all her future property of whatever kind or description, which was to be conveyed to the trustees by the husband and wife and all other necessary parties. Then the trusts of the settlement are for the wife for her life for her sole and separate use, without power of anticipation, with remainders over.

The first point to be considered is, what is the effect of that general covenant to settle after-acquired property on the wife's property settled to her separate use? It is quite settled by authority that if the wife is of age a proviso or agreement of that kind has the effect of a contract entered into by her; it is a covenant on the part of the wife as well as on the part of the husband.

The next point which arises is this, Is the same intention supposed to prevail when the wife is an infant? It is difficult to see why not. It is quite true it is an unusual thing to make an infant covenant at law; and, assuming the covenant may be for his benefit, it is only a voidable, and, not a void covenant. The very point was so decided in *Willoughby* v. *Middleton* (1). It was held that that form of agreement did include a covenant by the wife. That being so, I am bound to hold that this is a covenant by the wife, and therefore a covenant for the settlement of her future-acquired separate estate as to which she is not restrained from anticipation.

Then, is the covenant void or voidable? I think it is voidable. I cannot help seeing that there may be cases in which such a covenant as this would be for the benefit of the wife so as to protect her from her husband. It settles the property on her for life restrained from anticipation, with a remainder for the children. It is part of the whole arrangement made on the marriage by which provision is made for her and her children. It is a voidable covenant, in my opinion, and not a void covenant.

The next question is, What is the effect of such a covenant in equity? It has been said that the effect in equity of the covenant of the wife, as far as she is concerned, is that it does not affect her personally, but that it binds the property: that is to say, it binds the property under the doctrine of equity that that is to be considered as done which ought to be done. That is in the nature of specific performance of the contract no doubt. If, therefore, this is a covenant to settle the future-acquired property of the wife, and nothing more is done by her, the covenant will bind the property. There is no reason, as far as I am aware, for distinguishing a voidable covenant from any other covenant: till it is avoided it is a binding covenant.

Then, that being so, the remaining question is this: the covenant having been entered into by the wife when an infant, supposing

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(1) 2 J. & H. 344. 8 Jur N.S. 1055

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after she attains twenty-one the property comes to her, as it has in this case, during the coverture, and she has done nothing, what is the effect of the covenant on that property? I take it that it binds the property, and that the property will be subject to the settlement. But suppose that when the property comes to her, she says, "I have now attained twenty-one, and although I am a married woman, I do not choose to affirm the covenant: I disaffirm it." Can she do so? That brings me to the following point. No doubt, in the case of an ordinary personal contract entered into by a lady before marriage, she could not during the marriage get rid of that contract, although possibly the husband could by pleading the infancy of the wife at the time of the contract. Does that apply when the contract is only binding on the wife in this sense, that it binds her property? If she has a right in equity to dispose of property settled to her separate use without the consent or concurrence of the husband, does it not follow that she has the right to disaffirm any contract made by her that is voidable, and which only binds the property and does not bind the person? It seems to me to follow *ex necessitate* that the meaning of the power to dispose of property belonging to her for her separate use includes the right of saying, "I will dispose of the property notwithstanding the voidable covenant: I will disaffirm the covenant and take the property." That, as far as I understand, is one of the points decided in *Willoughby* v. *Middleton* (1). What will be the effect of her so doing is another question; but it seems to me impossible to hold that she has not a right to say, "I am not bound at all: you cannot bind me by the contract made during my infancy, and you cannot bind my property, and therefore my property remains mine for my separate use."

Then there arises another question, namely, can the wife during coverture elect? I think she can. I think that point is settled by *Barrow* v. *Barrow* (2) and one or two other cases. But can she during coverture elect so as to make herself bound by the contract and deprive herself of the power of saying it shall not affect particular property, although that property is not in possession, and, as far as she is concerned, not in existence? In other words, can she during the coverture, without the assistance of a

(1) 2 J. & H. 344. 8 Jur NS 1055 (2) 4 K. & J. 409. 4 Jur N.S 10

Court of Equity, elect to this extent, that she will make the covenant binding on property thereafter acquired, although at the time she has no property at all? I am not aware of any case deciding the exact point, but, looking at the current of authority, and not forgetting the recent case of *Pike* v. *Fitzgibbon* (1), I think she cannot. I think that the power of disposal given to a married woman as regards her separate property is simply a power to dispose of existing property, and not a power by contract, or *quasi* contract—for she cannot strictly contract—to dispose of other property while she is a married woman. In other words, I shall hold that the contract by a married woman, while married, to convey all her future-acquired separate estate will not bind that separate estate when acquired—that her power of disposition does not extend to that. It seems to follow that no confirmation by her of a settlement executed by her when an infant and containing such a contract will effectually bind her as regards the property not then acquired; that is, not in existence at the time of the confirmation. That disposes of the deed this lady executed in 1858, by which, to give effect to the settlement, she conveyed a portion of the property, being partly real estate, to the trustees upon the trusts of the settlement. That deed only makes all that property so conveyed subject to the settlement: she would therefore have a right to retain the property now in question.

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Then, what is the effect of the restraint on anticipation imposed by the settlement? I am not going to discuss this point for the sake of finally deciding it, but I must say it does not appear to have been considered sufficiently by the learned Judge who decided *Willoughby* v. *Middleton* (2). I am by no means clear that the effect of the wife's so-called election, that is, of her decision to keep her property to her separate use free from the voidable covenant, does deprive her of the property settled to her separate use without power of anticipation. No doubt, as a general rule, the person who elects to take against a deed forfeits all interest under the deed: the doctrine is one of compensation, although I have used the word "forfeit": but can a person forfeit an interest who is not liable to make compensation out of the property given to him or her by the deed for what is taken away by election? In the case

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(1) 17 Ch. D. 454.

(2) 2 J. & H. 344. 8 Jur N S 1055

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we have here of a married woman, can that doctrine extend to property which is, so to speak, not the person's own who elects, which is her own only in a modified sense—it is her own, but is incapable of alienation? Can she by an act of election make that alienable which was not alienable before? In electing she disappoints those who take less by reason of her election, but it does not appear to follow that you can thereby take away from her, in consequence of her act, that which was inalienable. I do not intend finally to decide the point, but it is one deserving consideration. If the doctrine were established according to the judgment of the Vice-Chancellor in *Willoughby* v. *Middleton* (1) this effect would follow, that the most careful provision for the protection of a married woman would be destroyed by reason of her election thereafter to take some property for her separate use (assuming she was an infant when she married), and the whole of her life interest provided for her by her father or relatives would be taken away. I should hesitate long before coming to such a conclusion; and it does not appear to me that the point was either sufficiently discussed in *Willoughby* v. *Middleton*, or sufficiently considered by the learned Judge who decided that case; therefore I do not regard that case as finally deciding the point so far as relates to the property or interest of the married woman in respect of which she is restrained from anticipation. It seems to me it may well be held that the property remains inalienable as it was before, notwithstanding the act of the married woman in electing to take her own property, and that the persons who take under the settlement have no right to complain because they know it was property which no act of hers could divest her of. However, it does not appear necessary to finally decide that point now, and I have only thrown out these observations in order that it may not be considered that I thought the point finally settled by the case referred to.

The demurrer must be allowed.

Solicitors: *Jones, Blaxland, & Son*, agents for *John Miller, Bristol*; *Thomas White & Sons*.

G. I. F. C.

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(1) 2 J. & H. 344. 8 Jm 25 1055

TRUMAN & CO. *v.* REDGRAVE.

[1881 T. 972.]

M. R.
1881
June 3.

Practice—Mortgage—Legal Mortgagee—Business—Hotel—Receiver and Manager—Injunction—Form of Order.

A legal mortgagee of business premises, such as an hotel, who is prevented by the mortgagor from taking possession under the mortgage, may obtain, upon an interlocutory application, an order for the appointment of a receiver and manager, and an injunction restraining the mortgagor from interfering with the management of the business and the possession of the premises.

Form of order appointing a receiver and manager, with an injunction.

[illegible]
25 Ch D 2

THE Plaintiffs, a firm of brewers, were legal mortgagees, by demise in 1878, of a leasehold hotel or public-house, No. 7, *Bow Street, Covent Garden*, called "*The Alexandra Hotel*," occupied and carried on by the Defendants, who were the mortgagors. The mortgage comprised also the trade fixtures, goodwill, and licenses, but was not registered as a bill of sale.

The adjoining house, No. 8, *Bow Street*, which was not included in the mortgage, was held by the Defendants under a lease granted by a person who was also the freeholder of No. 7, and was used as a lodging-house and restaurant in connection with No. 7, the necessary doorways and communications for the purpose having been made between the two houses.

In April, 1881, the Defendants' rent being in arrear, the landlord distrained on No. 7, and on the 12th of May following the Plaintiffs purchased the goods on the premises from him at the condemned price, at the same time leaving a man in possession to protect the goods, but a few hours afterwards the Defendants forcibly turned him out. On the following day the Plaintiffs served the Defendants with a demand for immediate payment of the mortgage debt, and the same not being paid, again put their man into possession, who was again, a few hours afterwards, forcibly ejected by the Defendants.

The Plaintiffs thereupon commenced an action claiming an account of what was due to them on their mortgage, foreclosure or sale on non-payment, an injunction to restrain the Defendants from interfering with the management of the business and the possession of the premises, the appointment of a receiver and manager of the hotel and business, and possession of the hotel. They now moved for the appointment of one *Henry Short*, a licensed victualler, as receiver and manager of the hotel, and of the business of a licensed victualler there carried on, until the trial of the action; also for an injunction to restrain the Defendants from interfering with the management of the business until the trial; or for such other order as the Court might think fit to make for the protection of the Plaintiffs' interests in the business and premises. The notice of motion did not include the adjoining house, No. 8 *Bow Street.*

The Plaintiffs' evidence tended to shew that, through want of funds, the Defendants were not in a position to carry on the business in a proper manner, and that in consequence the goodwill of the hotel was being depreciated.

The Defendants in their evidence alleged that the business was in fact carried on by them in both houses, Nos. 7 and 8, and that it was impossible to sever the two without destroying the business entirely, which would be the result of appointing a receiver and manager of No. 7 alone, as asked by the motion. The Plaintiffs, however, denied this, and alleged that the business could be carried on at No. 7, altogether independently of No. 8.

The Plaintiffs also produced the usual affidavits of fitness in support of their application for the appointment of *Short* as receiver and manager.

Romer, Q.C., and *P. S. Gregory*, for the Plaintiffs.

Yate Lee, for the Defendants, objected that the Plaintiffs were not entitled to have a receiver and manager of one part of the business only, so as to break up the business which had been carried on at both houses jointly; that the Defendants would become personally liable for any offences against the Licensing Acts committed by the receiver; and, moreover, that it was not the practice of the Court to appoint a receiver and manager upon an interlocutory application in such a case as the present, where the effect of the appointment would be to injure or destroy the business.

JESSEL, M.R.:—

The Plaintiffs are mortgagees of a hotel or public-house, together with the goodwill and licenses; and the Defendants are the mortgagors. The mortgage money—that is, the principal and interest—was in arrear; the rent was also in arrear; the landlord distrained, and the mortgagees, to save the chattels comprised in the mortgage, had to buy the goods from the landlord at the condemned price. The mortgagees then attempted to put a man in possession, but the Defendants thought fit to take the law into their own hands, and turned him out. Thereupon, the Plaintiffs did what was a very wise thing to do, instead of getting a force of navvies to put the man back again, they brought an action and asked for a receiver and manager. It appears to me to be a mere matter of course, and it would have been a matter of course even if the Defendants had not been guilty of these acts of violence.

[His Lordship then, after observing that the mortgagees could not be compelled to concern themselves in any way with carrying on business at No. 8, which was not comprised in the mortgage, proceeded:—] The other objection was this: it was said that if I appoint a receiver and manager of the hotel, it may be that the person who has the license will be liable to be summoned for some dereliction of duty on the part of the receiver. As to whether that is possible or probable I give no opinion; but, even supposing that to be so, that is only one of the unpleasant consequences of a man not being able to pay his debts. The publican or the licensed victualler is liable for the acts of his agent, if he appoints one, in consideration of a large sum of money being paid to him by way of loan. Nor is the receiver less his agent because until he pays off all the money borrowed by him he cannot be free; that is a contingency which he might have anticipated when he took the money of the mortgagees. It is rather late, after he has received the money and when he is unable to pay it, to speak of any consequences which are likely to result to him. The mortgagees, in nominating a person as receiver, are probably not more likely to do anything to incur such a risk as is suggested than the Defendants themselves.

I therefore make an order for reference to Chambers to appoint

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a receiver and manager, *Short* being appointed interim receiver and manager: there will also be an injunction against the Defendants as asked.

The order was in the following form:—

Upon motion, &c., this Court doth order that *H. Short*, of &c., be hereby appointed, without giving security, interim receiver and manager to receive the rents and profits of the "*Alexandra Hotel*," No. 7, *Bow Street*, in the county of *Middlesex*, and the business of a licensed victualler carried on thereon, and to manage the same until a receiver and manager of such hotel and business be duly appointed as hereinafter directed; the Plaintiffs by their counsel undertaking to be answerable for what the said *H. Short* shall so receive. And it is ordered that the Plaintiffs and Defendants do deliver over to the said *H. Short*, as such receiver and manager, all the stock-in-trade and effects of the said business, and all books and papers and licenses relating thereto. And it is ordered that the said *H. Short* do pass his accounts and pay the balances which shall be certified to be due from him into Court to the credit of this action, "*Truman & Company* v. *Redgrave*, 1881, T. 972." And it is ordered that the Defendants be restrained from interfering with the management of the said business and the possession of the aforesaid premises. And it is ordered that a proper person, upon first giving security, be appointed to receive the rents and profits of the said "*Alexandra Hotel*," No. 7, *Bow Street*, aforesaid, in the said writ mentioned, and to manage the business of a licensed victualler carried on thereon. And it is ordered that the said *H. Short* do deliver to the receiver and manager, when so appointed, all the stock-in-trade and effects of the said business, and all licenses, books, and papers relating thereto. And it is ordered that such receiver do from time to time pass his accounts, and pay the balances which shall be certified to be due from him into Court to the credit of this action, "*Truman & Company* v. *Redgrave*, 1881, T. 972;" and that such balances, when so paid in, be invested in Consolidated Three pounds per Centum Annuities.

Solicitors: *Hanbury, Hutton, & Whitting*; *J. Holder*.

G. I. F. C.

In re GREAVES, DECEASED.
BRAY *v.* TOFIELD.

[1878 G. 272.]

M. R.
1881
July 28.

Action—Decree—Creditors—Statute of Limitations (21 *Jac.* 1, *c.* 16).

In an administration action commenced in December, 1878, by one executor of a testator, who was also a creditor of his testator, against his co-executor, the usual judgment in a creditor's action was pronounced in December, 1879, and some time afterwards a claim was brought in by a creditor against the estate upon a promissory note of the testator, dated in November, 1873:—

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Held, that the claim was barred by the statute.

Sterndale v. *Hankinson* (1) observed upon.

THIS action was commenced on the 30th of December, 1878, and was for the administration of the estate of a testator, the Plaintiff being one of the executors and also a creditor of the testator.

On the 8th of December, 1879, the usual decree in a creditor's action was made with certain special directions.

The testator was at his death indebted to the *Midland Banking Company* in the sum of £300 for principal money due upon a promissory note dated the 11th of November, 1873, and the bank carried in a claim before the Chief Clerk against the estate of the testator in respect of the sum due on the note together with interest thereon, but the Chief Clerk by his certificate disallowed the claim.

This was a summons taken out by the *Banking Company* that the certificate might be varied by allowing the claim.

Chitty, Q.C., and *Bonser*, for the *Midland Banking Company*:—

Although the judgment in this action was not pronounced till after the expiration of six years from the date of the promissory note on which our claim is founded, yet the action was commenced within the six years. The action, though (as is now usual) not expressed to be on behalf of creditors, is for the benefit of all the creditors, and *Sterndale* v. *Hankinson* (1) decides that every creditor has, after the filing of the bill, or, as in this case, after the commencement of the action, an inchoate interest in the action to the extent of its being considered a demand, and to prevent his being shut out because the Plaintiff has not obtained a decree within the six years. The decision in *Sterndale* v. *Hankinson* (1) was approved of by Lord *St. Leonards* in *Bermingham* v. *Burke* (2).

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(1) 1 Sim. 393.

[*Berrington* v. *Evans* (3), *Watson* v. *Birch* (4), and *Manby* v. *Manby* (5) were also referred to.]

Romer, Q.C., and *Wiglesworth*, for the Plaintiffs, were not called upon.

Curtis Price, for the Defendants.

JESSEL, M.R. :—

I am of opinion that this claim is barred by the *Statute of Limitations*, and that it was properly rejected.

The debt on which the claim is made was incurred on the 11th of November, 1873. The writ in this action was issued on the 30th of December, 1878, and judgment was given on the 8th of December, 1879. This claim was brought in some time after the judgment. It is quite plain, therefore, that, unless the action for administration saved the claim from the operation of the statute, the claim is barred by the statute. It is a claim which can only be enforced by action, for it is a debt not secured by specialty, and is within the very words of the statute of *James*. The suggestion is that this action saved the claim. First of all, this is an action by one executor against the other, and is not at all an action on behalf of the creditors. It is an administration action, but not on behalf of the creditors, and the judgment would have saved it but for the reason which we thoroughly understand, that it was not pronounced till after the expiration of six years from the time the debt was incurred. There is no pretence for saying that this action was brought on behalf of the present creditors; and there is no reason in the world that I can conceive for getting rid of the operation of the statute on that account. Reliance is placed upon the case of *Sterndale* v. *Hankinson* (1), which was decided in 1827, far too long ago for me to interfere with it now, even if it had not been approved of by Lord *St. Leonards.* I wish to point out first of all that that case has no application at all to the action before me; and, secondly, that creditors had better not rely upon that decision for the future. In the first place, Vice-Chancellor Sir *John Leach* stated, and correctly stated, this (2): "The other fallacy is, that the statute bars the suit in Equity; which it does not. But, as Courts of Equity will not entertain stale demands, they have thought proper to adopt the limit of six years, in analogy to the statute; and pleas of the statute are admitted in these Courts by analogy only. When the circumstances of a case are such as to make it against conscience to apply the rule founded upon this analogy, the Court will not enforce it. It has been said that, if a creditor files a bill on behalf of himself and others, and permits it to be dismissed before decree, the statute would apply. I dissent from this proposition; for I think that the Court would protect a creditor against any accident of that kind. I have no doubt that, if a creditor file a bill and it appears that the rule adopted by analogy to the statute would affect his demand, but that a bill had been before filed by another creditor, and that the Plaintiff in the second suit had, in confidence that the former suit would be prosecuted, abstained from filing his bill, the Court would not apply its rule. Every creditor has, to a certain extent, an inchoate interest in a suit, instituted by one on behalf of himself and the rest; and it would be attended with mischievous consequences to estates of deceased debtors if the Court were to lay down a rule by which every creditor would be bound either to file his bill or bring his action. Suits have been instituted in which creditors, in consequence of the deaths of parties and a variety of other circumstances, have been unable to procure a decree for two or three years, although every reasonable diligence may have been used; and, if the schedules to most of the reports made in suits of this nature were looked through, it would be found by comparison of dates that two-thirds of the creditors might have been

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(1) 1 Sim. 393.
(2) 2 J. & Lat. 699.
(3) 1 Y. & C. Ex. 434.
(4) 15 Sim. 523.
(5) 3 Ch. D. 101.

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(1) 1 Sim. 393.

(2) 2 Sim. 398.

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shut out by a strict application of the rule. The principle of convenience does not apply; for the adoption of the rule, in all cases where the six years had run before the decree, would not, for the reasons I have before stated, be a protection to the estates of debtors, in the aggregate."

That shews the line of Mr. *Shadwell's* argument in that case, and that is the unceremonious way in which Sir *John Leach* treated the argument.

9 QBD 61

The decision, therefore, depended upon a variety of circumstances, as stated by the Vice-Chancellor, of which, I may say, none now exist. In the first place, the *Statute of Limitations* did not affect Courts of Equity, because it only applied to what were commonly called common law actions. If any action is properly described by the statute of *James*, that statute applies to the action now before the Court, whether it is brought in one Court or another; and the statute is consequently binding upon the High Court—there is no question about that—in every case to which it applies. Bills in Equity have been abolished, and wherever it is an action to recover a debt upon a contract, the statute is binding upon the High Court in every case in which it applies. In the next place, it is no longer the practice, as far as personal estate is concerned, to bring an action by one creditor on behalf of others. It is no longer necessary, because there is a provision in the Act of 1852 that any creditor might have a decree for the administration of personal estate, and, since the passing of that statute, now nearly thirty years ago, the practice has been abandoned of suing by one creditor on behalf of all, excepting in cases relating to real estate, as to which the section of the statute does not apply, unless it has been ordered to be sold, or there is a trust or power of sale. Therefore there are no longer any suits brought by a creditor, except for payment of his own debt; and you may always stop a suit by payment of the debt. Again, the reason for the decision no longer applies. You can get a decree in two days by a summons. You ought always to get it within a few days. If it is an unopposed decree it can be taken at once by summons in Chambers; but, however bitterly opposed it may be, if there is a debt at all, you can get a decree within a very few days, and, consequently, the reason for

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the Court of Equity exercising its discretion in favour of the creditor, to prevent the estate being torn to pieces by a multiplicity of suits, no longer applies; and the rule *cessante ratione legis, cessat ipsa lex*, applies also; and there is no reason in the world why this creditor should not have taken out his summons and got his decree long ago. It would not have hurt the estate at all, because the first judgment would stop all the others; and it must be recollected that it is only in cases where the action is nearly barred at the death of the testator that the creditor cannot wait. In that case, if he has been negligent too long, it behoves him to use due diligence the moment the man dies, so that what the Vice-Chancellor said about the rule of convenience, and the protection of the debtor's estate requiring the Court to exercise the discretion which it then possessed in favour of the creditor, no longer applies. It seems to me that the safest and plainest rule is to say that this being, as it is, a mere action for debt, it is within the very words of the statute, and the claim is barred. The summons is, therefore, dismissed with costs.

Solicitors: *Ridsdale & Co.; Pilgrim & Phillips; Ashurst, Morris, Crisp, & Co.*

G. M.

CERCLE RESTAURANT CASTIGLIONE COMPANY *v.* LAVERY.

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1881
Aug. 4.

[1881 C. 4357.]

Jurisdiction—Company—Winding-up Petition—Solvent Company—Creditor—Disputed Debt—Injunction.

The Court has jurisdiction to restrain by injunction a person claiming to be a creditor of a company from presenting a petition to wind up the company, where the debt is *bonâ fide* disputed, and the company is solvent.

THE *Cercle Restaurant Castiglione Company, Limited,* was incorporated on the 16th of February, 1881, with a capital of £6000 in 1200 shares of £5 each. Its primary objects were to carry on the business of a restaurant at No. 1 *Rue Castiglione, Paris,* and to take over a contract made the 21st of January, 1881, between the Defendant *Lavery,* the lessee of the premises, of the one part, and the Defendant *Yeldham*, as trustee for the intended company, of the other part. Under that contract *Lavery* was to grant a lease of the premises to the company, and he was to be paid £2000 for certain furniture and effects on the premises by instalments of £1000 each.

By an agreement dated the 16th of February, 1881, the day of the registration of the company, *Lavery* agreed that, in the event of the company finding the capital otherwise subscribed insufficient for working the company satisfactorily, he would pay to the company such sums, not exceeding in the whole £2000, as the directors might deem necessary, he taking fully paid-up shares equivalent to the amount so paid.

Under the contract of the 21st of January, 1881, the company were let into possession of the premises and furniture, and duly paid *Lavery* the first instalment of £1000.

Upon the second instalment becoming due *Lavery* applied for payment thereof, whereupon the company's committee of management, considering that the time had arrived for calling upon him to take up shares under his agreement of the 16th of February, passed a resolution requiring him to take 200 shares, equivalent to £1000, such shares to be allotted to him in exchange for his receipt for the second instalment of £1000 due to him. *Lavery*, however, refused to recognise his liability to take the shares, and insisted on his right to be paid the instalment in cash. The committee then passed a further resolution requiring him to take 400 shares pursuant to his agreement of the 16th of February, 200 to be handed to him in exchange for his receipt for £1000, and 200 for cash. Thereupon *Lavery*, on the 23rd of June, 1881, served upon the company the usual statutory notice for payment of the second instalment of £1000; and this notice was followed up, on the 21st of July, by a letter from *Lavery*'s solicitors to the company's solicitor, which, after referring to the notice, proceeded, "We are now instructed to present a petition to wind up the company, and we shall do so to-morrow unless the amount due (£1000) be paid to us before half past ten to-morrow morning."

The company then issued the writ in this action, and now moved, by special leave, for an injunction to restrain the Defendant *Lavery* from presenting a petition for the winding-up of the company, or from taking any proceedings against them to recover the £1000 he alleged to be due to him under the contract of the 21st of January.

It appeared from the evidence that the company owed nothing except ordinary debts and the amount (if anything) due to the Defendant *Lavery* under the contract of the 21st of January; also that they were perfectly solvent and doing a good business.

Ince, Q.C., and *Seward Brice*, for the Plaintiff company, submitted that the Court had jurisdiction to restrain a creditor of a company from presenting a winding-up petition where, as in the present case, the debt was disputed and the company was solvent: *Niger Merchants Company* v. *Capper* (1).

(1) M. R. 1877. Jan. 26.

NIGER MERCHANTS COMPANY *v.* CAPPER.

[1877 N. 7.]

THE *Niger Merchants Company, Limited*, was incorporated in June, 1876, for the purpose of trading with the *West Coast of Africa*. The Defendant, *Capper*, was shortly afterwards appointed chief agent, in *Africa*, of the company, at a guaranteed remuneration of not less than £300 a year, with liberty to draw monthly. As such agent he went first to *Spain*, and there purchased and fitted out for the company a steamer called the *Marie*, to proceed to *Africa* and to be used for trading purposes. The company subsequently discovered, as they alleged, that certain important facts in connection with the past history of the *Marie* had been concealed by the vendors, and that certain representations made by them with regard to her were not true. The *Marie* was afterwards lost, and the company brought an action in the Common Pleas Division against the vendors in respect of the alleged concealment and misrepresentations, and for breach of warranty. This action was now pending.

The Defendant did not reach the *West Coast of Africa* till September, 1876, and during that month goods of various kinds were forwarded to him from *England* by the company in the ordinary course of business, the bills of lading being forwarded to the Defendant as their agent, and being either indorsed in blank, or the goods to which the same respectively referred thereby consigned to him by name.

In the month of October, 1876, the Defendant, without leave or notice, returned to *England* on the alleged ground that complaints and charges had been made against him by the secretary of the company with regard to his conduct in the matter of the purchase of the *Marie*. He then gave notice to the steamship companies, the carriers of the goods forwarded by the Plaintiff company to *Africa*, not to part with such goods without his order, and he refused to deliver up the bills of lading in his possession. On the 15th of December the Defendant made a claim against the company for £610 16*s.* 1*d.* in respect of sums alleged to have been expended by him on behalf of the company, and he contended that he had a lien upon the goods in respect of such claim, as

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CERCLE RESTAURANT CASTIGLIONE COMPANY *v.* LAVERY.

Chitty, Q.C., and *Farwell*, for the Defendant *Lavery.*

Drake, for the Defendant *Yeldham.*

JESSEL, M.R., said that the conduct of the Defendant *Lavery* was wholly unjustifiable, and that he had no right to present a

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agent, according to the custom of the African trade. The company, on the contrary, maintained that the total claims which the Defendant could support against the company did not exceed £260, and that as against that sum there was due from the Defendant to the company for cash advanced to him, or paid on his behalf, various sums amounting to £532 2*s.* 6*d.*

Considerable correspondence passed between the parties relative to the Defendant's accounts, and on the 10th of January, 1877, the Defendant's solicitors wrote to the company as follows:—

"At present we are not aware of any questions on Mr. *Capper's* accounts. If there are any pointed out by Monday next, we will dispose of them; but, unless some are shewn to exist, Mr. *Capper* must proceed to wind up the company."

The company then issued a writ and moved for an injunction to restrain the Defendant from presenting a winding-up petition.

The Defendant denied having made any positive threat to wind up the company, and the evidence on the point was very conflicting. No allegation was made that the company was otherwise than in a solvent condition.

Ince, Q.C., and *Kekewich*, for the Plaintiff company.

Cookson, Q.C., and *Hatfield Green*, for the Defendant.

The following cases were cited: *Pim* v. *Wilson* (2 Ph. 653); *Dixon* v. *Holden* (7 Eq. 488); *Ex parte Rowan* (9 Ch. 617); *Cadiz Waterworks Company* v. *Barnett* (19 Eq. 182); *Merchant Banking Company of London* v. *Hough*, Vice-Chancellor *Hall*, Dec. 3, 1874.

JESSEL, M.R.:—

I have now merely to decide a question of law, the bare question whether or not the Court has jurisdiction to grant the injunction asked for by the Plaintiff company. The authorities stand thus: I find there is a case on this point, *Merchant Banking Company of London* v. *Hough*, not fully reported, in which Vice-Chancellor *Hall*, in December, 1874, upheld an injunction previously granted to restrain the defendants, who had a claim against the plaintiff company, from taking proceedings to wind up the company. Vice-Chancellor *Malins*, a few days later, granted a similar injunction in the case of *Cadiz Waterworks Company* v. *Barnett* (*sup.*), on the ground that it is the object of the Court to restrain the assertion of doubtful rights in a manner productive of irreparable damage; in other words, he thought that there was jurisdiction to restrain proceedings, or the institution of proceedings, intended to extort submission to demands, and which would irretrievably damage the company, who might very probably be utterly ruined by such proceedings. It seems to me that it is a very reasonable jurisdiction for the Court to possess and

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winding-up petition. The company having called upon him to take up and pay for shares to the amount of £1000 under his agreement of the 16th of February, 1881, by which he was clearly bound, he was not entitled, after refusing to do so, to say that the company ought to be wound up for non-payment of their instalment of £1000. He could not take advantage of his own wrong.

His Lordship accordingly granted an injunction until the trial, restraining the Defendant *Lavery* from presenting any petition to wind up the company in respect of any debt then due or alleged to be due to him, the company undertaking to issue shares to him to the amount of £1000. Costs to be costs in the action. His Lordship also directed the writ to be amended by making the Defendant *Yeldham* a plaintiff.

Solicitors: *M. T. Hodding*; *Pritchard, Englefield, & Co.*

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exercise. Here are two cases never appealed against. Why should I refuse to accept and follow them? The Courts must take into account the needs of the time as they arise, and accommodate themselves thereto.

On the authority of these two cases I decide there is jurisdiction which I can exercise if I think I ought to exercise it in this case.

It is plain there is no reasonable ground in this case for presenting a petition to wind up the company.

There is a *bonâ fide* dispute whether there is anything due from the company. When a company is solvent, the right course is to bring an action for the debt: where a company is insolvent, no doubt it is reasonable to wind up the company, even where the debt is disputed. In this case the petition would, undoubtedly, be dismissed. That being so, the question is, did Mr. *Capper* threaten the company with winding up? The evidence is disputed and conflicting, but there is sufficient evidence to decide the question for the present purpose. There is clear evidence in writing, in the correspondence, that such a threat was distinctly made: as to whether or not it was repeated there is a conflict of evidence; but, on the whole, I must take it as proved that such a threat was made and repeated. I will, therefore, grant an injunction as asked. As to costs, inasmuch as at the hearing I may possibly come to a different conclusion as to the evidence, I shall reserve them till I am able to come to a final decision of the case on its merits.

Solicitors: *Brook & Chapman*; *Trinders & Curtis-Hayward.*

G. I. F. C.

V.-C. B.

1881

April 7, 8, 9, 10, 13, 26, 27.

KEATE v. PHILLIPS.

[1878 K. 75.]

Equitable Priorities—Mortgage by Deposit—Incumbrancers without Notice—Fraud—Possession of Title Deeds—Estoppel.

In 1873, *D.*, in order to carry out a fraudulent scheme, obtained a transfer to himself of mortgages of freehold property, and after various dealings with it the legal estate was, in September, 1875, conveyed by a mortgagee to *H.* in trust for *M.*, and in March, 1876, by *H.* to *M.* *M.* was alleged to have been an accomplice of and trustee for *D.*

In August, 1874, in pursuance of this scheme, *T.*, claiming to be entitled to this property under a fictitious lease for ninety-eight years, purporting to have been granted to him in March, 1870, by a merely fictitious freeholder (an agent and accomplice of *D.*), demised the property by way of mortgage to *A.*

In November, 1874, *M.*, claiming to be entitled to the same property under a fictitious lease for ninety-nine years, also dated March, 1870, and purporting to be granted to him by *T.*, demised the property by way of mortgage to *B.*, the mortgage deed being executed by *M.* only.

In January, 1877, *M.* (to whom the legal estate had been conveyed in March, 1876) deposited the genuine title deeds of the property with *C.* upon a memorandum charging his estate and interest in the lands comprised in the deeds and a statutory declaration of title; and further advances were made to *M.* and *D.*, who came forward and stated that *M.* was merely a trustee for him of the property.

In 1878, *D.*, *M.*, and *T.*, were convicted and sentenced to penal servitude for forgery and fraud in connection with this property, and *C.*, as equitable mortgagee, entered into possession.

In an action by *A.* to settle the priorities of himself, *B.*, and *C.*, as incumbrancers on the property:—

Held: 1. That, assuming *T.* to have been the agent of *D.*, so that his representations to *A.* of having a good title were binding on *D.*, such representations followed by the acquisition of the property beneficially by *D.* did not bind the estate so as to give *A.* a prior equitable charge as against subsequent purchasers for value without notice.

2. That the like representations of *M.* to *B.*, followed by the acquisition, first, of the equitable, and afterwards of the legal estate by *M.*, did not put *B.* in any better position, and that the doctrine of estoppel did not apply so as to convert the fictitious title acquired by *B.* from *M.* in November,

1874, into a valid legal title *ab initio* upon the conveyance of the legal estate to *M.* in March, 1876.

3. That as purchaser for value without notice by deposit of the genuine title deeds, *C.*, though subsequent in date, was entitled in priority over *A.* and *B.*

THIS was an action to settle the priorities of three sets of incumbrancers who had each advanced money without notice on the security of the same estate, two of the securities being based upon forged leases of the property, and the third, though subsequent in date, being an equitable mortgage by deposit of the genuine title deeds.

In September, 1873, *Frederick Dimsdale*, then practising as a solicitor, but now under sentence of penal servitude, procured a transfer to himself of certain mortgages in fee of freehold property at *Banstead*, in *Surrey*, in which he had previously been interested as lessee at a nominal rental, consisting of about twelve acres of freehold land, with three detached villa residences—*Banstead Hall*, *Banstead House*, and *Basing House*, erected thereon, which were of the estimated letting value of £250, £200, and £150 per annum.

Having obtained the legal estate and documents of title of this property, the real estate was thus dealt with:—

On the 12th of September, 1873, *Dimsdale* sub-mortgaged the property to *Thomas Lyon* for £6000, and in September, 1875, the property was sold by *Lyon* under a power of sale in his sub-mortgage, and conveyed by him to *Holme*, who purchased the property nominally as a trustee for *C. B. Moore*. *Holme* and *Moore*, on the the 11th of September, 1875, mortgaged the property to *Lyon* for £5500, and on the 9th of March, 1876, the legal estate, free from the mortgage of £5500, was reconveyed by *Lyon* to *C. B. Moore* in fee (as trustee, it appeared, for *Dimsdale*). In pursuance of a fraudulent scheme for raising money upon the property, *Dimsdale* prepared, or caused to be prepared, certain fictitious leases, all dated the 8th of March, 1870, and expressed to be made between *Tait*, *Moore*, and *Leighton*, who were named therein as lessors and lessees, but who were merely agents of *Dimsdale*, and his assistants in the fraud.

By one of these leases *Leighton* purported to demise the property at *Banstead* unto *Thomas Irving Tait* for a term of ninety-eight years, at a ground rent of £20 5*s*.

On the 17th of August, 1874, *Tait*, acting under the directions and on behalf of *Dimsdale*, mortgaged the *Banstead* property to the Plaintiff by way of underlease for the residue of the term, less three days, as a security for £4860 expressed to be advanced to *Tait*, but in fact paid to *Dimsdale*, purporting to act as *Tait's* solicitor. The interest on this mortgage down to 1877 was paid to the Plaintiff by *Dimsdale*.

II. By another of these fictitious leases of 8th March, 1870, *Tait* purported to demise the same property to *C. B. Moore* for a term of ninety-nine years, at a ground rent of £37 10*s*. On the 16th of November, 1874, *C. B. Moore* demised the property comprised in this lease by way of mortgage to a building society, to secure £4400 and interest. This sum was subsequently reduced by *Moore* to £2700, and on the 10th of October, 1877, this mortgage was assigned to the Defendant *Phillips*, and the lease and mortgage were handed over to him.

III. In January, 1877, *C. B. Moore*, representing himself as the absolute owner of the *Banstead* property, applied to the Defendants Messrs. *M'Stephens*, discount brokers at *Manchester*, for a loan on his promissory note, to be collaterally secured by a deposit of the title deeds. About £4665, in two sums, was advanced in January and February, 1877, and the genuine title deeds and documents of the property (not including the fictitious leases of March, 1870) were deposited with *M'Stephens*, with a written memorandum signed by *Moore* by which he charged all his estate and interest in the lands in such deeds described, and the said deeds and documents, with payment of the sums advanced and interest, and agreed to execute to *M'Stephens* a mortgage of the property, with such power of sale, covenants, and conditions as *M'Stephens* might require. *Moore* also made, on the 1st of February, 1877, a statutory declaration of his absolute ownership of the property.

The title deeds mentioned in the schedule to the memorandum and deposited with *M'Stephens*, in whose possession they had ever since remained, included :—

7th March, 1870. Conveyance *C. J. Parke* and others to *C. Garrett.*

7th March, 1870. Mortgage *C. Garrett* to *R. C. Davis* and another for £6400.

11th September, 1873. Transfer of same *Davis* and another to *F. Dimsdale.*

12th September, 1873. Mortgage *F. Dimsdale* to *T. Lyon* with power of sale.

4th September, 1875. Agreement for sale *Lyon* to *Moore.*

10th September, 1875. Conveyance *Lyon* to *Holme* in trust for *Moore.*

9th March, 1876. Conveyance of legal estate *Holme* to *Moore.*

All the leases and title deeds were admitted, subject to just exceptions.

A deed was also admitted dated the —— day of ——, 1876, between *Holme, Moore,* and *Dimsdale,* but executed by *Moore* alone.

Shortly after the advance in January, 1877, by *M'Stephens* to *Moore, Dimsdale* came forward and stated to *M'Stephens* that *Moore* was not the owner, but only a trustee of the property for him.

Having agreed to confirm and become liable for the previous loans to *Moore, Dimsdale* procured from *M'Stephens* a further loan of £16,635 to himself and *Moore,* upon the security and deposit of the deeds of other property at *Croydon* and elsewhere. *Dimsdale* and *Moore* also joined in a memorandum, by which the deeds relating to the *Banstead* property were charged not only with payment of the £4665 (the sums, with added interest, advanced in January and February, 1877), but also collaterally with payment of all other moneys due from them or either of them to *M'Stephens.* In case of default in payment by the 27th of May, 1877, of the acceptances for £4665, *M'Stephens* might immediately exercise, with respect to the *Banstead* property, similar powers of sale to those over the *Croydon* and other property, and a power to enter upon the *Banstead* property was given.

On the 10th of October, 1877, *Dimsdale* filed his petition for liquidation, and *W. L. C. Browne* was appointed the trustee in such liquidation. In the same month *Dimsdale,* together with *Moore* and *Tait,* was arrested for forgery and afterwards convicted and sentenced to penal servitude.

M'Stephens & Co. thereupon, under the authority contained in their securities, took possession of the *Banstead* property, but afterwards gave up possession to the receiver in this action, which was brought in July, 1878, by *Keate* against *Phillips* and *M'Stephens* to establish his right to a charge or mortgage upon the *Banstead* property for £4860 and interest from the 17th of February, 1877, in priority to the incumbrances claimed by the Defendants. To this action *Browne,* the liquidation trustee of *Dimsdale,* was originally made a defendant, but he had disclaimed all interest in any of the matters in question in the action.

The Defendant *Phillips,* by his defence, denied notice of *Moore's* agency, and insisted that he was entitled, in respect of the mortgage of the 16th of November, 1874 (which was assigned to him on the 10th of October, 1877), to the benefit of the estate which became vested in *Moore* as an equitable estate in September, 1875, and as a legal estate in March, 1876, and to claim that such legal estate should enure by way of estoppel or otherwise in aid and support of, and by way of confirmation of, the term of years created by the lease of the 8th of March, 1870; and that *Moore,* and all persons claiming through, under, or in trust for him, were estopped from disputing the validity of such lease.

And, by way of counterclaim, *Phillips* claimed a declaration that he was entitled to a charge upon the property during the term purporting to be created by the lease to *Moore* of March, 1870, for the principal sum of £2700, and interest from the 10th of October, 1877, in priority to all other incumbrances thereon.

The Defendants *M'Stephens & Co.* claimed to be equitable mortgagees by deposit of the genuine deeds of the property without notice of any prior charges, and therefore to be entitled in priority over the Plaintiff and *Phillips.* They also, by counterclaim, claimed a declaration that they were entitled to a charge or mortgage upon the *Banstead* property for the sums of £4665 10*s.* and £16,635 10*s.* 6*d.*, interest, costs, and expenses, in priority to all other incumbrances thereon; and the usual relief by foreclosure.

Horton Smith, Q.C., and *E. T. Holland,* for the Plaintiff:—

The Plaintiff claims priority on the ground that the fictitious lease by *Leighton* to *Tait,* and the fraudulent mortgage to the Plaintiff by *Tait,* who was *Dimsdale's* agent and accomplice—and for the purposes of this action must be taken to have been *Dimsdale*—constituted a representation which was binding on *Dimsdale*, that a good and valid term of ninety-nine years had been created in the property. Having advanced our money and taken our security on the faith of that representation, we were entitled to compel the realization of such representation by the persons who made it: *Hammersley* v. *De Biel* (1); *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (2). And this was not a mere personal equity against *Dimsdale*, but an equity to have the representation made good out of the property in respect of which the misrepresentation was made, so as to give us a charge upon it to which effect will be given in equity: *Noel* v. *Bewley* (3); *Ingram* v. *Thorp* (4); *Smith* v. *Baker* (5); *Sharpe* v. *Foy* (6); *Slim* v. *Croucher* (7). This equity of the Plaintiff against the estate arose in September, 1875 (before *Moore* acquired the legal estate which he afterwards purported to deal with), when *Holme* acquired the legal estate on behalf of *Dimsdale*—for this was the effect of the transaction, the conveyance of September, 1875, being to *Holme* in trust for *Moore*, who, by a subsequent deed of 1876, admitted that he was a trustee for *Dimsdale*—and *Dimsdale*, being then for the first time clothed with a good title, became bound to make effectual that defective title which had been conveyed to the Plaintiff by *Dimsdale's* agent and accomplice *Tait*.

[BACON, V.C.:—Assuming that *Dimsdale* was bound to make good *Tait's* representations, that would create a personal obligation binding upon *Dimsdale;* but is there any authority that such a representation would create an equitable charge upon the land in whosesoever hands it should come?]

We submit that the cases go to that extent. Having, therefore, a contract for a mortgage which equity will enforce, we are in the position of prior equitable mortgagees, with the right to call for a legal mortgage; and our priority cannot be affected by any subsequent conveyance of the property even to a purchaser for value without notice: *Maxfield* v. *Burton* (8). By the conveyance of

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(1) 12 Cl. & F. 45.
(2) Law Rep. 6 H. L. 352.
(3) 3 Sim. 103.
(4) 7 Hare, 67.
(5) 1 Y. & C. Ch. 223.
(6) Law Rep. 4 Ch. 35.
(7) 1 D. F. & J. 518. 6 Jur NS. 437
(8) Law Rep. 17 Eq. 15.

March, 1876, *Moore* became a bare trustee, without any beneficial interest, for all persons having any interest in or upon the estate. His duty was to deal with the property so as to give effect to the several equities, and any dealing or conveyance by him of the legal estate which would have the effect of giving priority to any persons other than the Plaintiff, with notice of whose prior charge he was affected through *Dimsdale*, would be a breach of trust to which this Court will not give effect: *Carter* v. *Carter* (1); *Prosser* v. *Rice* (2). The Plaintiff and Defendants being all in the same position of equitable incumbrancers with the legal estate outstanding, all questions of priority must be governed by the rule, *Qui prior est tempore potior est jure;* and no priority can be obtained through the medium of a breach of trust or duty: *Cory* v. *Eyre* (3); and as against the Plaintiff, who has a better and superior because a prior equity, the defence of purchaser for value without notice will not be allowed to prevail: *Cave* v. *Cave* (4); *Phillips* v. *Phillips* (5); *Lewis* v. *Madocks* (6); *Stackhouse* v. *Countess of Jersey* (7).

As regards *M'Stephens & Co.*, mere possession of the title deeds gives them no priority, but merely the right to retain the deeds: *Manningford* v. *Toleman* (8); *Roberts* v. *Croft* (9); *Cory* v. *Eyre; Newton* v. *Newton* (10); *Thorpe* v. *Holdsworth* (11); *Waldy* v. *Gray* (12); for although, as purchasers for value without notice, they will not be deprived by the Court of any advantage honestly obtained, they will not be allowed to avail themselves of *Moore's* breach of trust in order to strengthen their own defective title: *Heath* v. *Crealock* (13); *Ortigosa* v. *Brown* (14). It is not enough to shew possession of the title deeds; they must shew that they have obtained them through gross negligence on the part of the Plaintiff whom they seek to postpone: *Carter* v. *Carter*. No such negligence can be attributed to the Plaintiff. When his security was effected what were stated to be the genuine title

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(1) 3 K. & J. 617. 4 Jur NS 63

(2) 28 Beav. 68.

(3) 1 D. J. & S. 149. ~~8 Jur NS 145~~

(4) 15 Ch. D. 639.

(5) 4 D. F. & J. 208. 8 Jur NS 145

(6) 17 Ves. 48.

(7) 1 J. & H. 721.

(8) 1 Coll. 670.

(9) 2 De G. & J. 1.

(10) Law Rep. 4 Ch. 143; Ibid. 6 Eq. 135.

(11) Ibid. 7 Eq. 139.

(12) Ibid. 20 Eq. 238.

(13) Ibid. 10 Ch. 22.

(14) 47 L. J. (Ch.) 168. WN (78) 13

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deeds of the property were handed to him, and in giving credit to that statement under circumstances which would not suggest any reason for suspicion, the Plaintiff has not been guilty of such wilful negligence in not getting all the deeds as to raise any equity against his priority: *Hunt* v. *Elmes* (1); and a good equitable security was created which *Dimsdale* and those claiming under him would be estopped from at any time disputing: *Dixon* v. *Muckleston* (2).

As against *Phillips* the same arguments apply. *Tait* was *Dimsdale.*

[*Hemming*, Q.C., on behalf of *Phillips*:—We do not admit that.]

We submit that their connection in the fraud, and identity are fully established upon the evidence and admissions. Assuming that *Phillips* has, as he claims, obtained the legal estate by estoppel through *Moore* (who, we say, was a trustee for *Dimsdale,* who through *Tait* created the terms under which both the Plaintiff and *Phillips* claim), that legal estate was not acquired until after September, 1875, when the Plaintiff's equity attached upon the estate; and our priority, which gives us the better right to call for the legal estate, and therefore is as good as the legal estate, *Willoughby* v. *Willoughby* (3), cannot be affected by any subsequent dealing with the property: *Sharples* v. *Adams* (4); and *Phillips* could only take subject to our equities. But the claim by estoppel must fail, as there can be no estoppel except in an action founded on the deed in which the fact in question is recited: *Carter* v. *Carter* (5); and in order to create an estoppel in favour of *Phillips,* there must have been a precise, clear, and unambiguous representation in the conveyance from *Moore* that he (*Moore*) was seised in fee or had the legal estate which is required by law: *General Finance, &c., Company* v. *Liberator, &c., Society* (6); *Crofts* v. *Middleton* (7).

Hemming, Q.C., and *Everitt,* for *Phillips*:—

We are entitled to priority, as we have obtained the legal

(1) 2 D. F. & J. 578. 7 Jur NS 206
(2) Law Rep. 8 Ch. 155.
(3) 1 T. R. 763.
(4) 32 Beav. 213.
(5) 3 K. & J. 617. 4 Jur NS 63
(6) 10 Ch. D. 15.
(7) 2 K. & J. 194. 2 Jur NS 529

estate by operation of law, and the Plaintiff has no charge upon the property. Their case is that *Tait* was *Dimsdale,* so that *Dimsdale* was bound to make good *Tait's* representations, and that this liability created a charge in equity upon the land in respect of which the representation was made. But *Tait* is not shewn to have been *Dimsdale,* and even assuming that *Tait* was *Dimsdale, Tait's* representations would give the Plaintiff a personal remedy only against *Dimsdale* for the deceit that has been practised upon him, and not an equitable charge upon the land. Assuming, however, that the Plaintiff is an equitable incumbrancer, he has no priority over *Phillips.* The underlease by *Moore* of November, 1874, which was assigned to *Phillips,* and which is admitted, created a term by estoppel between himself and *Phillips,* and when by the conveyance to him of March, 1876, *Moore* acquired the legal estate, the estoppel created by the underlease was fed by that conveyance, and the term which commenced by estoppel became good in point of interest, so that the legal estate vested in *Phillips* by operation of law, just as if *Moore* had been in the actual possession of the property at the time of such lease made: *Webb* v. *Austin* (1); *Sturgeon* v. *Wingfield* (2); *Trevivan* v. *Lawrence* (3).

It is said that *Moore* acquired the legal estate as trustee for *Dimsdale;* but if he did, it would not prevent the estoppel, and as a matter of fact it is not proved that he did so. All that is proved is, that in the course of their generally fraudulent dealings a deed with no more precise date than the —— day of —— 1876, at some time or other came into existence, the parties being *Holme, Moore,* and *Dimsdale,* and *Moore* alone executing, by which *Moore* purports to pass his equitable interest to *Dimsdale;* but there is no evidence as to when this deed was executed by *Moore,* and in a series of fraudulent transactions like these there is no presumption that the date, so far as it was stated, was truly stated by these accomplices. All that the deed shews is that at some time or other they thought it desirable to represent that *Moore* had been a trustee some time in the year 1876. That does not prove or tend to prove that he was a trustee when he got the legal estate in March, 1876. Even if he were, the case would be this: *Moore,* as the accomplice and agent of *Dimsdale,* and having no title, makes a lease to us in

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(1) 7 Man. & G. 701. (2) 15 M. & W. 224; 1 Sm. L. C. 107, 108 (8th Ed.)
(3) 6 Mod. 256.

1874, and then, also as the accomplice and agent of *Dimsdale*, acquires the legal estate for him in 1876. The actual estate will feed the estoppel just in the same way as if in both transactions *Moore* had been acting for himself alone.

If, then, we shew that *Phillips* has obtained the legal estate, the rule *Qui prior est tempore potior est jure*, on which the Plaintiff relies, is excluded. If the legal estate is outstanding without any special right in any of the parties to call for it, then, as between persons having only equitable interests, the rule will be applied, subject however to this qualification, that the contest must be between equitable interests only, and that the equities must be in all other respects equal: *Rice* v. *Rice* (1). Again, if no one has the legal estate, it may be a very good argument that the person with the better right to call for it is in the same position as if he had got it in, and will not be deprived in equity of that advantage: *Willoughby* v. *Willoughby* (2); *Brace* v. *Duchess of Marlborough* (3). But the right to call for the legal estate is equally excluded, as we have actually obtained it, not through any breach of trust, but by operation of law, without notice of any fraud or prior incumbrance. Eliminating fraud and notice, the legal estate, by whatever accident obtained, must prevail over any prior equitable security, and a purchaser for value without notice who has obtained the legal estate is entitled to retain it, and will not be interfered with in equity until every part of his incumbrance has been satisfied: *Pilcher* v. *Rawlins* (4) (which completely and emphatically disposes of *Carter* v. *Carter* (5), on which the Plaintiff relies); *Heath* v. *Crealock* (6). Then it is said that the doctrine of estoppel does not extend to equity. But this is not so. The *General Finance, &c., Company* v. *Liberator, &c., Society* (7) in effect establishes in equity the rule laid down in *Webb* v. *Austin* (8), that a lease creates an estoppel, and merely decides that covenants for title in a mortgage of freeholds do not amount to that precise averment that the mortgagor is seised of the legal estate, which is necessary in order to create an estoppel as against him. *Heath* v. *Crealock* proves our case, for there there was no estoppel whatever, as the conveyances, on which the purchasers relied as giving them the legal estate by estoppel, were ordinary conveyances by grant, "the operative words of which, as is well known, would create no estoppel" (1); and the decision would have been the other way if there had been a case of estoppel by demise or otherwise.

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(1) 2 Drew. 73.
(2) 1 T. R. 763.
(3) 2 P. Wms. 491.
(4) Law Rep. 7 Ch. 259.
(5) 3 K. & J. 617.
(6) Law Rep. 10 Ch. 22.
(7) 10 Ch. D. 15.
(8) 7 Man. & G. 701.

[BACON, V.C.:—The Plaintiff also claims under a demise.]

Yes, but neither his lessor *Tait*, nor *Leighton*, under whom *Tait* claimed, ever obtained the legal estate, as *Moore* did, and therefore he cannot, and does not, claim to have got the legal estate by estoppel subsequently fed. In *Maxfield* v. *Burton* (2), which was cited by the Plaintiff, there was a contract to convey for value as well as a deposit, which distinguishes the case, and the *dictum* in *Sharples* v. *Adams* (3) was there questioned as going too far having regard to *Pilcher* v. *Rawlins* (4). *Cave* v. *Cave* (5) is no authority for the Plaintiff's contention that a representation made by a person long before he gets the estate creates a charge upon the estate. As between *Phillips* and *M'Stephens*, *M'Stephens'* security by deposit being later in date is subject to ours, and, as legal mortgagees of a lessor, we are not to be postponed upon the ground of our not having got in the title deeds relating to the fee, to which, as termors, we had no right.

A. G. Marten, Q.C., and *T. A. Roberts*, for *M'Stephens*:—

As against the Plaintiff and *Phillips*, being purchasers for value without notice, possession of the genuine title deeds gives us the better equity, and an advantage over prior incumbrancers which equity will not take from us: *Stanhope* v. *Earl Verney* (6); *Wallwyn* v. *Lee* (7); and therefore there is no room for the application of the maxim *Qui prior est tempore potior est jure*, which is only applicable where the equities of the parties are in all other respects equal: *Rice* v. *Rice* (8). Besides holding the genuine title deeds, we took possession as mortgagees before either *Moore* or his assignees entered under the pretended lease. We are therefore entitled to priority, and have a better right than either the Plaintiff or *Phillips.* Moreover, the pretended lease to *Tait* was a forged deed, as proved by the conviction of *Dimsdale,* and no estate can pass by a forged deed, either to the Plaintiff through *Tait,* or to *Phillips* claiming under *Moore* from *Tait.*

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(1) Law Rep. 10 Ch. 30.

(2) Ibid. 17 Eq. 15.

(3) 32 Beav. 213.

(4) Law Rep. 7 Ch. 259.

(5) 15 Ch. D. 639.

(6) 2 Eden, 81; Co. Litt. 290 b (Butler's note).

(7) 9 Ves. 24.

(8) 2 Drew. 73.

The Plaintiff's case rests upon the assumption that he is an equitable incumbrancer by virtue of the representations made by *Tait* as agent for *Dimsdale,* which are said to have bound the land when *Dimsdale* acquired an interest in it. But the doctrine of equitable representation by estoppel is wholly different from contract: *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1); and all that the Plaintiff has is a personal equity, and not an equitable charge attaching upon the estate and affecting it in our hands: *Smith* v. *Osborne* (2) (where *Noel* v. *Bewley* (3), on which the Plaintiff relies, is stated to have been wrongly decided); *Eyre* v. *Burmester* (4); *Garrard* v. *Frankel* (5). Having taken a mortgage from a person who never had any title or interest in the property, and was not in possession as apparent owner, the Plaintiff cannot claim the benefit of the doctrine of purchaser for value without notice: *Ogilvie* v. *Jeaffreson* (6).

Assuming that the Plaintiff and *M'Stephens* had equal equitable rights, the possession of the deeds turns the balance, and gives priority to *M'Stephens,* who has, over the Plaintiff, who has not, that possession: *Layard* v. *Maud* (7); *Spencer* v. *Clarke* (8); and our possession of the title deeds will not be interfered with: *Heath* v. *Crealock* (9); and it is no answer to our case to say that, being equitable termors only, neither the Plaintiff nor *Phillips* could insist upon having the title deeds delivered over to them. The Plaintiff, in order to succeed, must shew that he has an equitable interest available against *M'Stephens & Co.* But, whatever right he may have against *Dimsdale,* he has no equitable interest whatever against the land, and *M'Stephens & Co.* by their advance to the owner of the legal estate upon a deposit with them of the original

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(1) Law Rep. 6 H. L. 352.
(2) 6 H. L. C. 375. 3 Jur N.S. 1181.
(3) 3 Sim. 103.
(4) 4 D. J. & S. 435.
(5) 30 Beav. 445. 8 Jur N.S. 985
(6) 2 Giff. 353.
(7) Law Rep. 4 Eq. 397.
(8) 9 Ch. D. 137.
(9) Law Rep. 10 Ch. 22.

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title deeds, have a better right to call for the legal estate, to the exclusion of the Plaintiff, than the Plaintiff, who paid his money and got nothing: *Fourth City Mutual Benefit Building Society* v. *Williams* (1); *Pease* v. *Jackson* (2). *M'Stephens & Co.* have a good title against all the world, and their security cannot be postponed on the ground of notice of the Plaintiff's security, every precaution having been taken by them and there being nothing to put them upon inquiry: *Crabtree* v. *Poole* (3); *Dodds* v. *Hills* (4). On the other hand, both the Plaintiff and *Phillips* were guilty of gross negligence and unexampled carelessness in not making inquiries as to their lessor's title, especially where, as here, the leases were recent; and as between innocent persons if one must suffer it is he who has not used due diligence in looking into the lessor's or vendor's title: *Keech* v. *Hall* (5); *Allen* v. *Clark* (6). The *Vendor and Purchaser Act*, 1874, by which (s. 2) a lessee is precluded from inquiring into the title to the freehold, had not come into operation at the time when the Plaintiff took his security. They also commented upon the following cases cited for the Plaintiff: *Manningford* v. *Toleman* (7); *Stackhouse* v. *Countess of Jersey* (8); *Roberts* v. *Croft* (9); *Newton* v. *Newton* (10); *Dixon* v. *Muckleston* (11); *Waldy* v. *Gray* (12); *Ortigosa* v. *Brown* (13); *Smith* v. *Baker* (14); *Ingram* v. *Thorp* (15); *Hammersley* v. *De Biel* (16); *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (17); *Cory* v. *Eyre* (18); *Carter* v. *Carter* (19) (as overruled by *Pilcher* v. *Rawlins* (20)); *Cave* v. *Cave* (21); and cited *Knox* v. *Gye* (22), *Shaw* v. *Foster* (23), *Heath* v. *Pugh* (24).

(1) 14 Ch. D. 140.
(2) Law Rep. 3 Ch. 576.
(3) Ibid. 12 Eq. 13.
(4) 2 H. & M. 424.
(5) Dougl. 21.
(6) 11 W. R. 304.
(7) 1 Coll. 670.
(8) 1 J. & H. 721.
(9) 2 De G. & J. 1.
(10) Law Rep. 6 Eq. 135; Ibid. 4 Ch. 143.
(11) Ibid. 8 Ch. 155.
(12) Law Rep. 20 Eq. 238.
(13) 47 L. J. (Ch.) 168. W.N.(78) 13
(14) 1 Y. & C. Ch. 223.
(15) 7 Hare, 67.
(16) 12 Cl. & F. 45.
(17) Law Rep. 6 H. L. 352.
(18) 1 D. J. & S. 149.
(19) 3 K. & J. 617. 4 Jur N.S. 6
(20) Law Rep. 7 Ch. 259.
(21) 15 Ch. D. 639.
(22) Law Rep. 5 H. L. 656.
(23) Ibid. 321.
(24) 6 Q. B. D. 345.

As against the Plaintiff's claim the *Statute of Frauds* (ss. 4, 7) also applies.

Then as to the claim of *Phillips* to have acquired the legal estate by an estoppel which was fed by the grant of the legal estate to *Moore* by the conveyance of March, 1876, so as to convert that which was a term by estoppel into a term good in point of interest, there can be no estoppel, as the lease of November, 1874, purported to be granted by *Moore* was not executed by the lessees under whom *Phillips* claims, and estoppels must be reciprocal, and must bind both parties or neither: *Wilson* v. *Woolfryes* (1); *Pike* v. *Eyre* (2); *Cardwell* v. *Lucas* (3); *Platt* on Leases (4); *Vin.* Abr. tit. Estoppel (5); *Co. Litt.* (6); *Shep.* Touchstone (7). Even if the lease had been executed by *Moore*, there was no entry under it; possession was never obtained, and accordingly he had a mere *interesse termini*, but no estate. The lease, which has been admitted, and which I now produce, shews that no one executed it except *Moore;* and the argument which could rest only on the assumption that the lease was executed by both parties falls to the ground on that assumption being displaced: *Co. Litt.* (8); *Smith* v. *Day* (9); *Lowe* v. *Ross* (10); *Edwards* v. *Wickwar* (11); and the want of possession cannot be cured by the *Statute of Uses*, as this property was leasehold. If there were an estoppel in favour of *Phillips*, there would be as between *Tait* and *Moore*, and then *Moore* would have an estate, and therefore as a certain interest passed by deed it could not be taken away by estoppel: *Treport's Case* (12). Estoppel, it is said, can only be created by demise, but there are in the underlease by way of mortgage express covenants which restrain the generality of the implied warranty: *Nokes' Case* (13), and do not amount to that strict representation that the mortgagor has the legal estate which is necessary to create an estoppel against him: *General Finance, &c., Company* v. *Liberator, &c., Society* (14). If estoppel

(1) 6 M. & S. 341.
(2) 9 B. & C. 909.
(3) 2 M. & W. 111.
(4) Pages 55, 56.
(5) (N.) pl. 26, (Q.) pl. 19.
(6) 352 a.
(7) Page 53, note (*i*), 8th Ed.
(8) 46 b.
(9) 2 M. & W. 684.
(10) 5 Ex. 553.
(11) Law Rep. 1 Eq. 403.
(12) 6 Rep. 14 b.
(13) 4 Rep. 80 b.
(14) 10 Ch. D. 15.

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is relied on, it must arise on the face of the instrument, and must be so pleaded, and the Court cannot go into the facts: *Trevivan* v. *Lawrence* (1).

Hemming, Q.C., asked to be heard upon the authorities cited by *Marten*, Q.C., against *Phillips*, but the Vice-Chancellor intimated that, independently of the argument based on the non-execution of the lease by the lessee, the claim founded on estoppel could not prevail.

Horton Smith, in reply:—

In the absence of any specific denial by the Defendants in their pleadings of the allegations contained in the statement of claim, the case set up by the Plaintiff that *Tait* was *Dimsdale*, and that his representations were binding on *Dimsdale*, must be taken to have been admitted under Rules of Court, 1875, Order XIX., rr. 17–20, 22: *Thorp* v. *Holdsworth* (2); *Rutter* v. *Tregent* (3); *Byrd* v. *Nunn* (4); *Benbow* v. *Low* (5); *Green* v. *Sevin* (6). That such representations created a charge upon the estate which could have been enforced when *Dimsdale* acquired the title to it on the conveyance to *Holme* in September, 1875, is shewn (in addition to the cases already cited) by *Roundell* v. *Breary* (7); *Watson* v. *Sadleir* (8); *Metcalfe* v. *Archbishop of York* (9); *Smith* v. *Osborne* (10). *Moore* was merely trustee for *Dimsdale*, and therefore, as against equitable claims created by *Dimsdale*, the common law doctrine of estoppel has no application.

[He was stopped on this point.]

The Plaintiff is not shewn to have been guilty of any negligence, and in order to displace on this ground our pre-existing equitable charge, the *onus* of proving gross negligence, tangible and distinct, is thrown upon the Defendants.

[He was stopped on this point.]

The Defendants *M'Stephens & Co.* claim priority on the ground that they have obtained a legal charge, but the memoranda, though

(1) 6 Mod. 256; 2 Ld. Raym. 1048.
(2) 3 Ch. D. 637.
(3) 12 Ch. D. 758.
(4) 7 Ch. D. 284.
(5) 13 Ch. D. 553.
(6) 13 Ch. D. 589.
(7) 2 Vern. 482; 2 De G. & J. 319, n.
(8) 1 Moll. 585.
(9) 1 My. & Cr. 547.
(10) 6 H. L. C. 375.

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under seal, could not confer any legal estate: *Wood* v. *Leadbitter* (1). Possession of the title deeds gives them no priority, and cannot improve their equity, as they would only take what *Moore* had to give: *Newton* v. *Newton* (2); *Baillie* v. *M'Kewan* (3); and though they claim to have obtained a legal advantage in respect of their possession of the land, of which, as purchasers for value without notice, they say they ought not to be deprived, that possession is altogether distinct from, and must not be confounded with, the right to it—the question here to be determined—and will not be allowed to deprive the Plaintiff of his pre-existing and undoubted equitable title: *Phillips* v. *Phillips* (4); *Shropshire Union Railways Company* v. *Reg.* (5).

Marten, Q.C., called attention to the comments upon *Phillips* v. *Phillips* in *Sugden's* Vendors and Purchasers (6).

Bacon, V.C.:—

This is a most singular case. No cases are more difficult than those in which the Court has to decide between innocent parties who have suffered through some fraud, whose right is to prevail. The rule *Qui prior est tempore potior est jure* is a very convenient rule when it can be applied, but when a case is accompanied by circumstances so complicated as the one before me, it is impossible solely to rely on that well-established rule of law.

Now, the Plaintiff, to take his case first, insists shortly on this: A man named *Tait* pretended to want money on mortgage, and the Plaintiff agreed to lend it to him upon the mortgage of a leasehold—an underlease, which served the purpose of the mortgage, and upon that occasion *Dimsdale* is said to have been the solicitor acting in the matter. The transaction took place, no doubt, in *Dimsdale's* chambers. *Dimsdale's* affidavit—if I paid any attention to it, which I do not think I ought to do, and I mention it only as part of the narrative before me—would have it understood that it was his son who transacted all this business, that *Mortimer*, the solicitor for the Plaintiff, came into his room,

(1) 13 M. & W. 838.

(2) Law Rep. 6 Eq. 135.

(3) 35 Beav. 177.

(4) 4 D. F. & J. 208. 8 Jur NS 145.

(5) Law Rep. 7 H. L. 496.

(6) 14th Ed. p. 796.

having concluded the business with his son in an adjoining room, and said, "I have done a pretty piece of work with your son to-day." Whether it is true or not, of course I do not stop to inquire; I should not rely upon anything that *Dimsdale* said. The solicitor's clerk who was concerned in the transaction has proved that the business was conducted in a reasonable way. He admits that there was no inquiry into the lessor's title, which he says, and which we all know, is not usual, notwithstanding the decisions which give to a purchaser or an intended lessee the right to inquire into the lessor's title if that should not have been guarded by the contract which they have entered into; and it is not helped by the subsequent Act of Parliament (*Vendor and Purchaser Act*, 1871), which received the Royal Assent after the transactions were complete. The solicitor's clerk proves that the business was regularly transacted, that there was a valuation of the property, that the mortgage money was advanced and paid to and received by *Dimsdale*, whom he took to be the mortgagor's solicitor. That is the whole that I have of evidence, or anything that I can rely upon in this case as to the first transaction. Then the contention of the Plaintiff is this: It is not alleged that *Dimsdale* made any representation in the proper sense of that word, but the contention is that from what he did, seeing the mortgage completed, and receiving the mortgage money, it must be inferred that he represented that the lease from *Leighton* to *Tait*, and then the underlease from *Tait* to the Plaintiff, was a valid, genuine, legitimate transaction. Those are the slenderest representations, as far as the evidence goes, that can be conceived. If I were to infer from the nature of the case, I do not hesitate to say that it would amount to a suggestion, if not a representation, that *Dimsdale* was the actor and author of all this; and, it being admitted that *Tait* and *Leighton* had no interest whatever in the property, it is clear upon the evidence that *Dimsdale* had an interest. What was *Dimsdale's* interest at that time? He had an equity of redemption in this property which he had mortgaged to one *Lyon*. That was his sole interest. The Plaintiff's argument is that by virtue of and by force of these representations, as they are called, made by *Dimsdale*, he did effectually charge the property in which he had this equity of redemption, and as a consequence, when he acquired, as at a subsequent date he did acquire, the absolute beneficial interest on paying off *Lyon's* mortgage, that then the right of the Plaintiff against him was to have the representation carried out to its full extent, and to the extent of making a charge upon the property supposed to be comprised in the fictitious lease.

I have listened to very numerous cases, I have attended to all of them; but I never heard of, and I do not believe that there can be found, any case in which that principle has been carried to the extent to which the Plaintiff seeks to carry it, and to which he must carry it in order to obtain any relief. Admitting, as I have no reason to doubt, that *Dimsdale* was a malefactor, and that he had committed a gross fraud, and made use of *Tait* as an instrument, and that he had imposed upon the Plaintiff and upon *Phillips*, what of that? How does that touch the estate? It would be misconduct for which he could be punished, and a wrong which could be redressed against him personally, but I am at a loss to see how it touches the estate. This brings it close to that doctrine of estoppel which has been argued at such length and with great ability. The common law doctrine of estoppel was, as I have said, a device which the Common Law Courts resorted to at a very early period to strengthen and lengthen their arm, and not venturing to exercise an equitable jurisdiction over the subject before them, they did convert their own special pleading tactics into an instrument by which they could obtain an end which the Court of Chancery, without any foreign assistance, did at all times, and I hope will at all times, put into force in order to do justice. But the doctrine of estoppel is purely legal. There is no case in which a trustee, having made a fraudulent representation by which he was bound, or even a fraudulent conveyance, when he got his legal estate confirmed, but still remaining a trustee, was so estopped as to deprive the persons beneficially entitled to the estate which was theirs, and of which he was the trustee and trustee only. The doctrine of estoppel, therefore, in my opinion, has no place whatever in the case before me. I cannot apply that which is unquestionably the Common Law doctrine, nor can I, applying it to the merits of the case, say that *Moore's* subsequent acquisition of the legal estate, which he did acquire, at once confirms the validity of the original transaction. But where is the case to be found that says that a man who has committed a misdemeanour and contracted an equitable liability is not at liberty afterwards, with a *bonâ fide* purchaser, to deal with the thing which in his hands might be charged, but which when once out of his hands it is impossible that a Court of Equity can ever reach so as to make the subject itself —the substance—liable for the nefarious transactions into which this man entered. This difficulty, which I felt when the case was opened, has not been removed either by the arguments I have heard or the authorities which have been cited, or by any observations which can be made upon it. It cannot be said that because a man commits a misdemeanour with relation to a certain estate, that the estate is thereby for ever bound. No case has been quoted that goes anything like that length. The equitable right, and the equitable estate, are distinguished in some of the cases which have been mentioned. *Stanhope* v. *Earl Verney* (1), an old case, but a case decided by one of the most eminent Judges that this jurisdiction has possessed (2), clearly makes a distinction between an equitable right, a personal obligation, and a right which attaches itself to the land or to the substance of the thing which is the subject of the contract or transaction. I have heard no such case mentioned. There are many observations in the cases that have been cited to me, some of them little better than commonplaces, others highly interesting, most of them curious and entitled to great attention, but I have never heard that because a man commits a personal wrong, that he therefore deprives himself of all the right of dealing with property which is his, in favour of a subsequent purchaser. Now, that is the whole case before me. Assuming that there was a representation made, of which the evidence is of the slightest kind possible—not a representation in fact, but a representation to be inferred from facts which are proved—it cannot be said that that is a representation which so deprives the owner of the equity of redemption, which is all that *Dimsdale* had, as that he cannot afterwards deal with that for value to a person who pays him, or lends him money on the security of it.

What I have said about the Plaintiff's claim applies with equal, and perhaps with greater, force to that of *Phillips*, because that *Moore*, who evidently was an accomplice (who was brought up here and intended to be examined, but counsel in their discretion did not think fit to examine him), was the instrument and agent of *Dimsdale*, is plainly proved. It was proved by the deeds themselves, and it is proved, among other things, by that statutory declaration in which *Dimsdale* and *Moore* join in saying that *Moore* is only trustee, and that *Dimsdale* is the person beneficially entitled. The Plaintiff's case, in my opinion, fails in his attempt to fix the charge upon the mortgaged estate. That he has been robbed, signally cheated and injured, nobody can for a moment dispute. But that he has a right to extend his charge to the estate in which *Dimsdale* was then the owner of the equity of redemption, I can find no authority for saying, nor any principle on which it can be maintained.

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(1) 2 Eden, 81.

(2) Lord Chancellor *Northington*, in June 1761.

That brings me to the third charge, against which I have not heard one word of exception. A man who is a money-lender, or banker, is applied to to lend money and he does so—it is not necessary to observe at an exorbitant rate of interest, because it may not be so unreasonable in the city of *London* as it seems to us here. He lends it first to *Moore* for a period, and at a later period *Dimsdale* appears. *Dimsdale* then avows himself to be the beneficial owner of the property, and adopts and confirms all that *Moore* had done, and contracts further obligations for himself. Upon *Moore* first procuring the loan he represented himself as the owner of the estate, and produced the title deeds, which deduced a very clear title to him, with the exception only of one deed. *M'Stephens'* solicitor very naturally said, "This is all very well as far as it goes, but how comes it to you?" Thereupon Mr. *Waterhouse* (*Moore's* solicitor) goes back to his chambers, or somewhere else, and returns with the deed executed by *Holme*, and transferring the legal estate to *Moore*. That made the chain of documentary evidence complete, and upon that the transaction was carried through. *M'Stephens* lent his money, and had, and retains, possession of the deeds. He had them on the terms of the three several memoranda which have been put in evidence, and besides them, the statutory declaration which I have already referred to. Then, if it be a true principle of the Court of Equity that you

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cannot take from a purchaser for valuable consideration without notice anything which he has acquired, how can I say that the mortgage made to *M'Stephens* is not a mortgage first in point of rank on this estate? The case is one of extreme difficulty. The rights of the parties are quite clear in point of morals, and if *Dimsdale* was able to make good, I dare say the means might be found of his making good the wrongs which he has done to each of these parties. That is not the case before me. The question I have to decide is, whether by what took place in 1874, when *Dimsdale* stood by and saw the Plaintiff lend his money, and afterwards in the same year, 1874, when *Moore*, the accomplice of *Dimsdale*, his agent, went through the sham mortgage in favour of *Phillips*, an obligation was created which attached itself so as to make a burden on the estate which neither *Moore* nor *Dimsdale* could ever deal with, and which, being dealt with to a purchaser for valuable consideration without notice, is to be treated as a nullity. In my opinion the Plaintiff's claim fails.

The claim of Mr. *Phillips* also fails—I mean to the extent of affixing any burden on the land. To the claim of *M'Stephens* I have heard no valid objection, and therefore, in my opinion, he is first in the incumbrances upon this estate. The action of the Plaintiff and the counter-claim of *Phillips* must therefore be dismissed. I make no order as to the costs of this action, for I see no ground for imputing to the Plaintiff negligence in the transaction. If I did, that might influence my judgment on the point of costs.

Solicitors: *Crowder, Anstie, & Vizard; W. H. Tattam; T. Durant.*

F. G. A. W.

In re LONDON, BOMBAY, AND MEDITERRANEAN BANK.

V.-C. H.
1881
April 12.

Company—Winding-up—Contributory—Shares taken by a Husband in his Wife's Name.

S. (a Parsee merchant) applied for 300 shares in the *London, Bombay, and Mediterranean Bank*, 100 in his own name and 200 in the name of his wife *M.*, paying the deposit on the whole 300 out of his own moneys. The company allotted the shares accordingly, and *S.* subscribed the memorandum and articles of association on *M.*'s behalf as well as his own, and paid all calls upon all the shares. *S.* afterwards sold and transferred 140 of the shares allotted to *M.*, executing the transfers for her, or in her name. All these transactions took place without *M.*'s knowledge.

In 1866 the company was ordered to be wound up, and at that date the name of "*M.* the wife of *S.*" was on the register as a past holder of 140 shares, and the then holder of sixty shares.

S. died shortly afterwards, and the name of *M.* was placed upon the A list of contributories in respect of sixty shares, and upon the B list in respect of 140 shares.

M. had no separate estate.

Upon an application by the liquidator to have the B list rectified by placing thereon the names of *S.*'s executors instead of the name of *M.*:—

Held, that the company having accepted the wife as a shareholder without any misrepresentation or concealment on the part of the husband, his estate was not liable, and the company were not entitled to any rectification of the list.

ADJOURNED SUMMONS.

In the year 1864 *Sorabjee Jehangeerjee Daver*, a Parsee merchant of *Bombay*, applied for and paid the deposit on 300 shares in the *London, Bombay, and Mediterranean Bank, Limited,* a company formed under the *Companies Act,* 1862—100 in his own name and 200 in the name of his wife *Mherbai.* The company, in compliance with this application, allotted 100 shares to *Sorabjee* and 200 to *Mherbai,* and *Sorabjee* thereupon subscribed the memorandum and articles of association in respect of all the 300 shares, as to the 200 shares subscribing thus, "*Sorabjee Jehangeerjee Daver* for *Mherbai* his wife." The company's bankers gave to *Sorabjee,* in respect of each twenty-five of the 200 shares allotted to *Mherbai*, a receipt in the following form: "Received from *Mherbai,* the wife

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of *Sorabjee Jehangeerjee Daver*, the sum of," &c., "being the amount of deposit on twenty-five shares in" the company; and *Sorabjee* indorsed all the receipts given to him in respect of these 200 shares, "*Sorabjee Jehangeerjee Daver* for *Mherbai* his wife." *Mherbai* was an illiterate woman and unable to read or write in any language, and the application allotment and payments were made without her knowledge, and all subsequent payments and signatures in respect of the 200 shares were made by *Sorabjee* in a similar manner.

Between the 11th of October, 1865, and the 27th of January, 1866, *Sorabjee*, without *Mherbai's* knowledge, sold 140 of these 200 shares to six different purchasers. In every instance he received the purchase-money and executed the transfer deed, signing the deeds either "*Sorabjee Jehangeerjee Daver* for *Mherbai* his wife," or "*Mherbai*, wife of *Sorabjee Jehangeerjee*, by *Sorabjee Jehangeerjee*."

In June, 1866, the company was ordered to be wound up, and at the date of the winding-up the name of *Sorabjee* appeared in the share register as the holder of 100 shares, and the name of *Mherbai*, described as "the wife of *Sorabjee*," appeared therein as a past holder of 140 shares and as the then holder of sixty shares.

Sorabjee died on the 13th of March, 1868, having by his will, dated the 8th of March, 1868, given all his real and personal estate to *Mherbai*, and appointed her and his two sons his executors.

In August, 1868, the A list of contributories was settled; and the name of *Mherbai* was inserted therein as a contributory in respect of sixty shares.

In February, 1878, *Mherbai* was settled on the B list of contributories in respect of the 140 shares which had been allotted to her and sold as above mentioned.

In December, 1878, a call of £10 per share was made on all the contributories; and in the month of April following the Vice-Chancellor held, upon a summons taken out on behalf of *Mherbai* to have her name removed from the list, that she was liable only to the extent of such separate estate as she was entitled to or had power to dispose of during the coverture. Upon the hearing of this summons the attention of the Court was not called to the fact of *Mherbai's* ignorance of the transactions with regard to the shares, and the liquidator having become acquainted with this fact, and *Mherbai* having no separate estate to meet the calls upon the shares, he now applied to have the B list of contributories rectified by inserting therein the names of *Sorabjee's* executors instead of that of *Mherbai* in respect of her separate estate, so as to make the estate of *Sorabjee* liable in respect of the 140 shares.

Hastings, Q.C., and *Whitehorne*, for the liquidator:—

Although the husband, in order to escape liability, or for some other purpose of his own, chose to take the 200 shares in the name of his wife, he was the real contracting party, and the only person who ever "agreed to become a member" in respect of them. His estate ought therefore to be liable for the calls upon the 140 shares, and his executors ought to be placed upon the B list of contributories instead of the wife only. It is, in fact, a case in which the register should be rectified by placing upon it the name of the true owner instead of the name of the person whom he put forward: *Pugh and Sharman's Case* (1); *Richardson's Case* (2); *Companies Act*, 1862, ss. 23, 38.

W. F. Robinson, Q.C., and *Phipson Beale*, for *Mherbai* and the other legal personal representatives of the husband:—

Mherbai, in respect of her separate estate, and not her husband's representatives, ought to be upon the B list of contributories. The husband never was in any sense a shareholder in respect of these shares, for the application was made in her name, her name was entered on the register, and the company, with full knowledge of the facts, accepted her as a shareholder, and always treated her as such. It is not a case in which *Mherbai* can be held to have been a trustee for her husband. There was no concealment nor fraud, nor anything false or fictitious or wanting in good faith about the transaction, and it is too late for the company now to object and to fix the husband's estate with liability: *King's Case* (3); *Williams' Case* (4).

There never was any contract between the company and the husband, and it was quite competent for *Mherbai*, though a married woman, to become a shareholder: *Matthewman's Case* (1).

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(1) Law Rep. 13 Eq. 566.

(2) Ibid. 19 Eq. 588.

(3) Law Rep. 6 Ch. 196.

(4) 1 Ch. D. 576.

The case is distinguishable both from *Pugh and Sharman's Case* (2) and *Richardson's Case* (3); for in the one the application for shares was in a false name, and the element of fraud was present, and in the other the application was in the name of an infant.

Hastings, in reply, referred to *Cox's Case* (4) and *Weston's Case* (5).

HALL, V.C.:—

This is a case which has been extremely well argued, and so far as I know there is no case of the kind to be found amongst the authorities. The contention of the liquidators is that this is to be treated as a case in which a person has applied for and taken shares in the name of another, so that upon the true name being discovered, that name will be put upon the register, by way of rectification, instead of the name which was originally put forward. It is said that, looking at the Act of Parliament in order to get at the liability of the husband, or, as he is dead, of his estate, the case must be considered as if the process of rectifying the register had been gone through; and the register being treated as rectified, the case is brought within the provisions of the Act of Parliament, for we have then got a person who agreed to take the shares, and who is on the register in respect of the shares. Of course that is not in point of fact the state of things here; but upon the case presented to the Court it is supposed that that process has been gone through, and that the matter has been put in that position. Now, there is no case that I am aware of in which the register has been rectified where the name has been put upon the register deliberately by the company, without any fraud or concealment whatever.

In this case the facts were stated to the company by the husband when he made the application for the shares. He said,

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(1) Law Rep. 3 Eq. 781.
(2) Ibid. 13 Eq. 566.
(3) Law Rep. 19 Eq. 588.
(4) 4 De G. J. & S. 53.
(5) Law Rep. 5 Ch. 614.

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"I desire to have so many shares allotted to myself and so many to my wife." I take it to be established that he paid the money payable on application and allotment, if there were two sums payable. I do not know how that was, but he found the money. He told the directors that they were to put the shares into the name of his wife. It now appears from the affidavit of the wife (and this seems to have been the sheet-anchor of this application) that she was not informed of the transaction, and knew nothing about it. And it also appears that a year or two after the shares were allotted it suited the husband's purpose to dispose of some of them, and that he did so, the wife being equally ignorant of that. That circumstance again is made use of as fortifying the case of the liquidator on the present application.

But it appears to me that, the whole of the facts having been communicated to the company, I cannot assume that the husband intended to practise a fraud upon them by putting forward the name of his wife as the holder or allottee of the shares, or that there was any fraud on the part of the applicant. The object which is imputed to the husband is that he might save himself from liability by not leaving the shares in his own name; but from the circumstances of the case, looking at the whole transaction, and at the position of the parties, I draw the conclusion that the transaction was meant to be what it purported to be—that the husband meant to make a provision for his wife by means of these shares, and accordingly requested the company to put them into her name. The non-communication to the wife of the fact, that the shares had been put into her name, could not have the effect of varying the actual effect and operation of the transaction. The shares were in her name, and although she, as a married woman, was under a disability in respect of them, and although the company were in a peculiar position with reference to any claim they might make against her in respect of them, yet they thought fit to accept her liability as a shareholder for whatever it might be worth, or whatever might be the result as affecting the transaction. It is said that she had no separate estate, but apparently the company made no inquiry upon that point. They may have trusted, and very likely did, to the money being found for paying the calls upon those shares; or in default, to the ordinary remedy, which I presume they had, of forfeiture of the shares; and matters in all probability were very likely to have gone on according to the inception of the transaction, if the company had prospered and gone on (which I must assume the parties at that time contemplated would be the case) as a continuing and paying company. In that state of things the moneys to pay the calls would in all probability have been found, not out of the separate estate, there being none, but practically either by the husband or by the appropriation of dividends which might have accrued upon these shares, and have been accumulated and applied for that purpose, or in some other way.

But what I do not find here is that element which I think exists in all the cases in which a person has been put upon the register who is not the person whose name was originally there. I do not find any case in which that has been done where there has been no concealment of the real transaction from the company, and they have thought fit to accept the person as a shareholder. There is no misrepresentation or concealment in this case as to infancy or otherwise which will enable the Court to act. The application by the company to rectify the register (if it could have been made at all) ought to have been made immediately after the transaction took place, and they can certainly be in no better position now than they would have been if they had come to the Court immediately afterwards. It is said that the real position of things was not known by the company—that they did not know that the wife had not been applied to to give her consent; that they did not know that there had been no communication of the transaction to her. In fact their case is attempted to be made out of what has subsequently happened, namely, their ascertaining that the wife was not communicated with, and was not aware of the transfer and the subsequent dealings with the shares by her husband. Some part of these circumstances could not have been brought forward immediately when the transaction took place because they occurred subsequently; but although they may now be used as evidence to shew what was the real nature of the transaction, they do not to my mind bring the case within any authority which has been referred to as shewing that the husband was the person whose name ought to have been upon the register as being the real applicant for the shares on his own account.

I must, therefore, acting upon the two authorities which have been referred to, viz., *Williams' Case* (1), before the Master of the Rolls, and *King's Case* (2), before the Court of Appeal, consider that (so far as this case is to be decided on authority) those are the governing cases rather than the others which have been referred to, in which there were circumstances which certainly ought to have been disclosed to the company, but which were not in fact disclosed.

I shall dismiss this application with costs; and the liquidator will have his costs out of the estate.

Solicitors: *Munns & Longden*; *Pattey & Hart.*

W. W. K.

GREAT AUSTRALIAN GOLD MINING COMPANY.
Ex parte APPLEYARD.

V.-C. H.
1881
April 7, 9, 11; May 2.

Debentures given up to be cancelled—Contract by Company to issue fully paid-up Shares—Consideration—Contributory—Proof for Damages in the Liquidation—Companies Act, 1867, *s.* 25.

A., a director, and the solicitor of the *Great Australian Gold Mining Company*, obtained by assignments from *K.*, one of the vendors of a mine, situate in *South Australia*, to the company two debentures of and which were given by the company for 500 each in part payment of the purchase-money; and in consideration of *A.* giving them up to be cancelled the company contracted to issue to him 500 £2 fully paid-up shares. No contract was ever registered under the provisions of the 25th section of the *Companies Act*, 1867. *A.* had been by order of the Court placed on the list of contributories for the 500 shares.

On summons taken out by *A.*:—

Held, that there was no duty cast upon him to register the contract; and that, the breach of the contract by the company having been established, *A.* was entitled to prove in the liquidation for damages for calls made or which might be made on the shares.

Mudford's Claim (3) followed.

Houldsworth v. *City of Glasgow Bank* (4) distinguished.

THE *Great Australian Gold Company* was formed and registered in March, 1873, to work gold mines under three pieces of land

(1) 1 Ch. D. 576.
(2) Law Rep. 6 Ch. 196.
(3) 14 Ch. D. 634.
(4) 5 App. Cas. 317.

situate at *Hawkins Hill, South Australia.* An agreement was on the 10th of May, 1873, entered into between Mr. *Kavenagh* (one of the vendors), on behalf of himself and Messrs. *Nichols & Minton*, of the one part, and Mr. *Charles Appleyard*, on behalf of the company, of the other part, for the sale and purchase of the leases of the three pieces of land.

The purchase-money was £100,000, and it was to be paid to the vendors thus:—£50,000 in cash and £50,000 in 25,000 fully paid-up B shares in the company.

The shares, £2 each, were to be issued by the company and taken by the vendors as part of the purchase-money.

On payment of the purchase-money the vendors were, as the articles provided, to convey the three pieces of land and liberty to work the mines for gold and other minerals through or over the same, and all the rights of the vendors, to the purchasers according to the *Gold Fields Acts* and the regulations thereunder; and such fully paid-up B shares should not be liable to the payment of any future calls or sums on account of the company, and the holders of such shares should be wholly free from any liability whatsoever to contribute on account of such shares to any of the debts or liabilities of the company.

Of the proportion of B shares to which Mr. *Kavenagh* was entitled in respect of the purchase a large number were at his request allotted to Mr. *Appleyard*, his nominee, as fully paid up.

Other arrangements were come to as to the £50,000, which was to be paid in cash, and under them the greater part of the sum was paid by an issue of debentures and of nominally fully paid-up A shares.

Of these shares 500 were on the 14th of October, 1873, at Mr. *Kavenagh's* request, allotted to Mr. *Appleyard.*

Of the debentures issued to Mr. *Kavenagh*, two for £500 each, dated the 1st of September, 1873, and payable on the 1st of September, 1878, with interest at 10 per cent. per annum, were assigned by him on the 18th of September, 1873, to Mr. *Appleyard*, who, on the 24th of November, 1873, surrendered them to the company in exchange for an allotment of 500 other A shares, nominally fully paid up.

The company got into difficulties and was ordered to be wound up, and a liquidator was appointed.

An inquiry having been directed at Chambers, it was certified that Messrs. *Minton & Nichols* held three grants or licenses from the Crown of lands, two of ten acres each, and one of three acres; that the two former were assigned to trustees for the company by a deed of transfer, which was registered on the 27th of November, 1873, and the latter was assigned by a similar transfer, which was registered on the 29th of December, 1873; that on the 30th of April, 1874, the Lands Department replied to an application of the company's managing director in the colony to the effect that leases of the lands comprised in the grants were being prepared in the names of the transferees as well as in those of the original applicants, and would be issued as soon as practicable; also that possession was taken of the lands, and that shafts were sunk thereon during a period of about six months, but there was nothing to shew that the company had possession when the transfers were made. The right to the leases became forfeited.

In the liquidation an application was made at Chambers to place the name of Mr. *Appleyard* on the list of contributories for each of the two lots of 500 A shares. The matter came before the Court on an adjournment from Chambers, and was heard in February, 1880. The Vice-Chancellor held that the application must be granted, and on appeal by Mr. *Appleyard* to the Lords Justices, the order was, on the 21st of April, 1880, affirmed.

Mr. *Appleyard* having been called upon to pay two sums of £500 each in reference to the latter 500 shares—those which were issued to him by the company in exchange for the two debentures—took out a summons, adjourned into Court, seeking to prove in the winding-up against the company in respect of an alleged breach of contract by the company that he should have 500 A shares fully paid up.

It was stated that Mr. *Appleyard* acted as solicitor for the promoters, and afterwards for the company; and also that he was a director of the company.

Rigby, Q.C., for the summons:—

It is submitted that on the authorities Mr. *Appleyard* is, in respect of the contract which was entered into between him and the company, entitled to prove for £1000. The question is a short one. The contract entered into for the purchase of the leases of the land need not be discussed now, for the reason that no attempt has been made to unravel the transaction. The plain facts are that Mr. *Appleyard* became, by assignment from Mr. *Kavenagh*, the holder of two debentures which had been issued by the company, and these debentures, being enforceable against the company, were, by an arrangement between Mr. *Appleyard* and the company, given up for 500 fully paid-up A shares and cancelled. It cannot be contended that there was not valuable consideration for the surrender and cancellation of the debentures. Mr. *Appleyard* performed his part of the contract, but the contract on the part of the company that Mr. *Appleyard* should have 500 fully paid-up shares was not performed by them, as he had been required to pay £1000 for them. The decision on *Mudford's Claim* (1) lays down the right in such a case to prove for damages for the amount of the calls made, or which might be made, and the fact of the contract not being registered—and there was no contract registered under the Act of 1867 in this case—is no bar to Mr. *Appleyard's* claim. Where a person has been guilty of negligence, the usual consequences will follow; but there is no proof of negligence, contributory or otherwise, on the part of Mr. *Appleyard*, who is not now asking for equitable but legal relief, the question being whether he can prove for £1000 as for damages. It will not be suggested on his part that there ought to be rescission of the contract. The complaint of Mr. *Appleyard* is that the contract with him has not been performed by the company, and the relief sought is that the company shall be made liable for the breach of it. Though Mr. *Appleyard* filled the positions of director and solicitor, there is no question of any failure of duty on his part to the company, which suffered no loss from non-registration of the contract; on the contrary, the company gained £1000 more than they expected to get. The observations of Lord Justice *James* in *White's Case* (2) support the claim now made for damages, but an order as in *Mudford's Claim* is asked for.

The case of *Houldsworth* v. *City of Glasgow Bank* (3) may be referred to, but it has not the slightest application to the circumstances of this case.

(1) 14 Ch. D. 634. (2) 12 Ch. D. 511, 522. (3) 5 App. Cas. 317.

W. Pearson, Q.C., and *Grosvenor Woods*, for the liquidator:—

It was through Mr. *Appleyard's* own neglect, as every transaction with Mr. *Kavenagh* was carried out with his knowledge and under his advice, that he has been placed in his present position. The company is wholly insolvent, and will pay only a small dividend to *bonâ fide* creditors. This case is altogether distinguishable from *Mudford's Claim* (1). There was no binding contract, in fact no contract at all, between Mr. *Appleyard* and the company on which he could sue. It was not a case of purchasing something from the company, but Mr. *Appleyard*, a co-partner with other shareholders, said that the company entered into a contract for valuable consideration to give him 500 A shares fully paid up, there being no written agreement, but only minutes in the books, and it would be impossible to spell out of them such a contract as alleged by Mr. *Appleyard*, who from his position knew that the shares were not paid up at all. Even if there were a contract it was invalid, being *ultrà vires*, and therefore not binding on the company; and the decision of the House of Lords in *Houldsworth* v. *City of Glasgow Bank* (2) is quite in point. The debentures were issued and assigned in September, 1873, but at that time there had been no assignment of the leases of the land to the company. There was no power in the directors, Mr. *Appleyard* being one, and taking part in all transactions, to undertake to pay money for that which they had not got, and which in fact they never did get possession of; consequently, in September, 1873, they had no right to issue the debentures which were assigned to Mr. *Appleyard*. It was his duty to see that there was a proper assignment of the leases before debentures were issued. The A shares given in exchange were issued at the end of November, 1873. Assuming there was a contract by the directors, there was no valid consideration for it, the debentures being void or voidable, and Mr. *Appleyard* being a party to all the transactions which made them so. Mr. *Appleyard* got all he bargained for—the shares allotted to him in his name and as fully paid up, and he being the holder of them, and they not being paid for in cash, he was liable as a contributory for them. Again, if there were a valid contract, and a breach of it by

(1) 14 Ch. D. 634.

(2) 5 App. Cas. 317.

the company, it arose through Mr. *Appleyard's* own neglect and default, and on that ground he is not entitled to prove for damages. If it had been a common mistake, Mr. *Appleyard* should have asked to have the contract rescinded or reformed, but he could not do that in consequence of the winding-up. *Midland Great Western Railway of Ireland* v. *Johnson* (1); *Houldsworth* v. *City of Glasgow Bank* (2) cannot be distinguished from the present case. A partner in a firm cannot in a winding-up, either in a bankruptcy or in this Court, come in competition with *bonâ fide* creditors.

Neither the observations in *White's Case* (3) nor the decision in *Mudford's Claim* (4) should be followed in this case, but the summons should be dismissed.

[*Burgess's Case* (5) was also referred to.]

Rigby, Q.C., in reply, referred to *Barrow's Case* (6) to shew that the company was bound by their contract, which was not performed; not giving to Mr. *Appleyard* that which they undertook to give him. *Mudford's Claim* was a sound decision, and should now be followed.

May 2. HALL, V.C.:—

Mr. *Appleyard* having been put on the list of contributories in respect of these 500 A shares, seeks to prove in the winding-up against the company in respect of an alleged breach of contract by the company, that he should have these 500 A shares as fully paid up.

It was said on the part of the liquidator that the alleged contract was not shewn to have been entered into. It appears to me that the alleged contract is established by the minutes of the proceedings of the directors at board meetings, and the allotment and the registration of the shares.

Something was said as to the contract for the purchase of the mines not being enforceable, but the contract has not been set aside and has been acted upon, and I cannot act on the present occasion on the view that the contract should be treated as wholly void. Indeed I have not had evidence submitted to me establishing such a case. The company seem to have taken possession and sunk shafts therein during a period of six months.

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(1) 6 H. L. C. 798. 4 Jur N S 643
(2) 5 App. Cas. 317.
(3) 12 Ch. D. 522.
(4) 14 Ch. D. 634.
(5) 15 Ch. D. 507.
(6) 14 Ch. D. 432.

Mr. *Appleyard* obtained by assignments from Mr. *Kavenagh*, who was treated as one of the vendors of the mines, two debentures of, and which were given by, the company for £500 each in part payment of the purchase-money for the mines, and it was in consideration of his giving up those debentures to be cancelled that the company issued to Mr. *Appleyard* the shares in respect of which he has been placed on the list of contributories. It was said that Mr. *Appleyard* did not give any consideration for the debentures, and that if he did the consideration was promotion money, and that in either case the shares were not acquired for any valuable consideration, or at all events not such consideration as the Court would recognise. The evidence as to the consideration for the debentures is not altogether clear, but I am not able to say, the debentures having, in fact, been given in part payment of the purchase-money for the mines, that the giving up of the debentures should be considered as not being any consideration for the issuing of the shares, or that Mr. *Appleyard* should be treated as having received those debentures, and in substitution for them the shares, as promotion money, and therefore unable to make any claim upon the contract.

It appears to me that the consideration was, in part, recompense for money lent, and in part, services rendered to Mr. *Kavenagh* by Mr. *Appleyard* as his solicitor. Fraud on the part of Mr. *Appleyard* has not been suggested.

On the whole I think the liquidator has not made out a case in opposition to the claim, founded on the debentures and shares being held by Mr. *Appleyard* without consideration or as representing promotion money. I have above assumed but not decided that if such a case had been made out in evidence the claim would have been thereby displaced.

It was said that Mr. *Appleyard* might and should have had a proper contract registered, particularly as he was a director and a solicitor of the company, and then he would not have been put on the list of contributories, and thus it is his own fault if he suffers loss under the contract. It appears to me that this is not an answer to Mr. *Appleyard's* claim. His not having done this, is not a loss to the company, and the creditors of the company are benefited by the omission. However, there was not, I consider, a duty cast on Mr. *Appleyard* which can be set up as a bar to the claim.

It was said that the contract between Mr. *Appleyard* and the company was *ultrà vires.* This does not so appear to me. Although the 167th article of association provided for payment of the purchase-money on the leases being assigned to the company, other articles gave to the directors ample powers, acting under which they could and did arrange for part payment by issuing debentures, and under which they could issue to Mr. *Appleyard* shares fully paid up.

On *Mudford's Claim* (1) I acted on a contract by a company to give fully paid-up shares as a valid contract, and allowed a proof. I think that what I have said disposes of the alleged specialities in the present case, and this being so, I must hold that Mr. *Appleyard* is entitled to prove in the winding-up, unless the case of *Mudford's Claim* be shewn not to be law. Mr. *Appleyard* claims to prove in respect of his payments made or to be made for calls on the shares, and I think he is entitled to such proof. As to *Mudford's Claim,* I considered my decision to be supported by what was said by Lord Justice *Cotton* in *White's Case* (2). His Lordship said, "He must make such a claim as he can in respect of damages for the non-compliance by the company with the contract into which they entered;" and Lord Justice *James* said (3), "That the order will be discharged as to those shares without prejudice to any question whether Mr. *White* is entitled to any damages against the company." It was, however, contended that the decision in *Houldsworth* v. *City of Glasgow Bank* (4) shews that the decision in *Mudford's Claim* is wrong. I have considered that case and the several judgments delivered by the Law Lords in the House of Lords. The judgment of Lord *Cairns* was mainly relied on, and some passages in his and the other judgments were said to be favourable to the liquidator's contention in the present case. That case was one not of contract but of fraudulent misrepresentation, and it is to be observed that Lord *Cairns* (1) placed reliance on this, viz., that damages for a fraud committed on the shareholder by the company cannot be intended to be included in the contract to take the shares, and he afterwards said the claim was inconsistent with the contract into which he had entered, and that in making the claim he was approbating and reprobating. It was considered, and no doubt rightly, that the shareholder there had by contract devoted the assets to the payment of the debts and liabilities of the company, and that a claim for damages in respect of a fraud practised on him was not in contemplation of the parties, and from the nature of the case was excluded by the parties.

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(1) 14 Ch. D. 634.
(2) 12 Ch. D. 521.
(3) 12 Ch. D. 522.
(4) 5 App. Cas. 317.

The observations of Lord *Selborne* in his judgment (2) seem to me to recognise a shareholder's rights as being in ordinary cases the same as those of a stranger, the case of a claim founded on a fraudulent procuring of a person to take shares being, however, distinguishable from other claims of the shareholder, for the reasons stated in the judgment, especially, because it, as Lord *Selborne* considered, would involve his getting from his co-shareholders full indemnity without himself contributing to the claim, although the contract was not and could not be rescinded.

The judgment of Lord *Hatherley* is perhaps more general and favourable to the contention of the liquidator, but it should, I think, be read as applicable only to the case with which their Lordships had to deal. Lord *Blackburn* guards his judgment in a manner which I think prevents its applying to the present case. On the whole I think the case cannot be deemed to be applicable to a case of contract like the present, and I therefore think the present case must be considered to be governed by *Mudford's Claim* (3).

Solicitors: *West, King, Adams, & Co.; Appleyard.*

(1) 5 App. Cas. 325.
(2) 5 App. Cas. 329.
(3) 14 Ch. D. 634.

T. F. M.

V.-C. H.
1881
Feb. 7;
May 9;
June 22.

ATTORNEY-GENERAL *v.* DEAN AND CANONS OF MANCHESTER.

[1880 A. 1218.]

Collegiate Body—Surplus Revenues to be paid to Ecclesiastical Commissioners for Administration—Action against Collegiate Body for Accounts—Charity —Charitable Trusts Act, 1853 (16 & 17 *Vict. c.* 137), *ss.* 17, 62—*Consent of Charity Commissioners—Mandamus.*

By an ancient charter a collegiate body was founded at *Manchester*, and they were seised of the rectory of the parish, and of the tithes, glebe lands, and other property for religious and temporal purposes in the parish. The property having considerably increased in value, an Act of Parliament was in 1850 passed authorizing the division of the parish into several parishes, and for the application of the revenues. Accounts of receipts and expenditure by the collegiate body were to be rendered yearly to the Ecclesiastical Commissioners, by whom it was to be applied and the surplus paid, *inter alia*, in payment of yearly or other sums as to them should seem fit to each and every or any one or more of the incumbents of the benefices in the parish. The accounts which were rendered by the collegiate body to the Commissioners were complained of by the incumbents on the ground that many of the disbursements were illegal. A request made to the Ecclesiastical Commissioners to take proceedings to check the expenditure being declined, the incumbents brought an action against the collegiate body for the purpose of enforcing a compliance with the statute, and the Ecclesiastical Commissioners were made co-Defendants. A mandamus was claimed against the collegiate body to compel them to render accounts. Both Defendants demurred, one ground being that the consent of the Charity Commissioners to the action had not been obtained:—

Held, that the object of the action was to obtain a proper account of the funds which ought to be transferred to the Ecclesiastical Commissioners and which would be administered by them as charity for the benefit of the incumbents of the benefices, therefore the consent of the Charity Commissioners to the action proceeding was, under the 17th section of the *Charitable Trusts Act* of 1853, necessary.

In re Meyrick's Charity (1) and *Attorney-General* v. *Sidney Sussex College* (2) followed.

Held, also, that, though a mandamus were the only relief sought for, the matter would still be left within the operation of the 17th section of the Act, because a mandamus is a proceeding for obtaining an order concerning a charity.

Holme v. *Guy* (3) observed upon.

THE Plaintiffs were the Attorney-General on the relation of the Rev. *Joseph Nunn* and ten other clergymen, on behalf of themselves and all other the rectors, incumbents, or ministers of the rectories, parishes, or districts now existing or hereafter to be constituted within the parish of *Manchester*, save the Dean of the Cathedral or Collegiate Church of *Manchester*, and the Defendants were the Dean and Canons of that Cathedral and the Ecclesiastical Commissioners.

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(1) 1 Jur. (N.S.) 438. (2) 15 W. R. 162. (3) 5 Ch. D. 901.

The statement of claim set forth that the Dean and Canons were the successors of a collegiate body of secular priests called the College of *Christ*, at *Manchester*, founded within the parish church, and by the charter of incorporation, dated the 4th of August, 1421, which proceeded from the diocesan of *Manchester* —the Bishop of *Coventry* and *Lichfield*—erected into a collegiate church.

The charter was preceded by a license from King *Henry* V., and by a deed of assent agreed to at a public meeting held by the churchwardens and principal inhabitants of the parish, and purported to be granted at the instance of *Thomas* Lord *De la Warre*, patron and incumbent of the church, and trustees, the Bishop of *Durham* and others, whom he had associated with himself for carrying out his objects. The charter was applied for in consequence of the injury which the church and the parishioners had sustained from the frequent non-residence of the rectors, and the object of the foundation of a collegiate body, who, under the charter, became the impropriators and perpetual incumbents of the church, was to prevent the future recurrence of the mischiefs which were complained of. The terms of the charter and license set forth the number of persons the corporate body was to consist of, and their duties. Under the statute 1 Edw. 6, c. 14, the college was dissolved, but in the reign of *Philip* and *Mary*, it was by another charter reconstituted. At that time there was only a single parish church in *Manchester*.

Another charter was granted to the college by Queen *Elizabeth*, and another by King *Charles* I.

The property of the college at the times of all the charters consisted of the ancient rectorial endowments of the parish. The terms of the charters, and grants given to the college, shewed that the main object of the founder and the grantors was the spiritual benefit of the parishioners, who in the time of King

Charles I. numbered about 20,000. By the last charter the college was re-established. It was to consist of one warden and four fellows in priests' orders, and they and their successors were to be a body corporate by the names of the warden and fellows of *Christ's College* in *Manchester.* Each future warden was to be appointed by the Crown, and the future fellows were to be elected by the warden and fellows. There were to be two chaplains to officiate every day in the church, and there were also to be four each singing men and boys to perform Divine Service daily in the church. Also there were to be a subwarden, and a treasurer or bursar, a collector of rents, teacher of the choristers, an organist, and a bailiff. They were to be chosen by the warden and fellows and their successors. The subwarden, treasurer, and collector of rents were to be chosen from the number of fellows, and the other officers from the remainder of the collegiate persons.

Power was given to the warden, and fellows, and their successors, of specifying, assigning, and limiting the nature and kind of officers of that description, and of fixing how much and what kinds of salary they should receive. The charter contained a grant from the Crown to the warden and fellows of certain lands and tenements and tithes issuing out of lands in the parish; and the church of *St. Mary*, and of all property and endowments purported to have been granted to them by the previous patents, or which belonged to the previous foundations. It also set forth the stipends which were to be paid to the warden (£70), fellows (£35 each), chaplains (£17 10*s.* each), singing men (£10 each), and boys (£5 each) out of the revenues of the college, but when certain leases, which were referred to, should end, the stipends of the warden and fellows were to be augmented in the proportions mentioned; but they were not to receive any emolument from fines on leases until the church should have been repaired, and there should have been provided houses for them and their successors to live in; and according to their discretion the chaplains and others were to receive an increase in their stipends.

By the 3 & 4 Vict. c. 113, the warden and fellows were to be styled "Dean and Canons," and the patronage of the canonries was vested in the Bishop of *Manchester*. It was enacted that such fixed annual sum should be determined on to be paid to the Ecclesiastical Commissioners by the Dean and Canons as after due inquiry and a calculation of the average annual revenues of the chapter should leave to the Dean and each canon an average annual income of £2000 and £1000 respectively, and that the moneys to be paid to the Commissioners should form a common fund to be applied in making additional provision for the cure of souls in parishes where such assistance was most required. By Acts subsequently passed the bishopric of *Manchester* was founded, and the bishop for the time being was duly constituted the visitor of the cathedral, which the collegiate church had by the statutes become.

Since the charter of King *Charles* I. the population of *Manchester* had enormously increased. From time to time certain district parishes had been formed out of the original parish under the provisions of certain Acts. The district churches had nominal endowments, and the incumbents were dependent on pew rents and fees. The revenues of the collegiate church had during the same period so increased, that by judicious management the annual income might reach £30,000. It being considered by many persons at *Manchester* that the primary object of the endowments of the college was the spiritual benefit of all the parishioners, and that that object had not been sufficiently secured by the Acts referred to, an Act was in 1850 (13 & 14 Vict. c. 41) passed to authorize the division of the parish of *Manchester* into several parishes, and for the application of the revenues of the collegiate and parish church. After the recital of the charter of King *Charles* I., and the subsequent facts, there were enactments for the creation of new parishes by subdivision of districts, the building of churches and the endowments thereof, and then by sect. 13 it was enacted that all moneys which should be payable to the Ecclesiastical Commissioners from the Dean and Canons under the authority of any Act should from time to time be applied towards making better provision for the cure of souls within the parish of *Manchester*, and towards "providing for payment to the incumbents or ministers of all or any of the churches or districts" in the parish "of any annual sums or sum which by any Order or Orders" in Council were or thereafter should be charged on the common fund under the control of the Commissioners so as to release the fund from its liability in respect thereof. By sect. 14 the stipends of the future Dean and Canons were to be in the whole £1500 and £600 respectively, and of each chaplain £250, to be paid out of the annual revenues of the collegiate church, and it was enacted that the Dean and Canons for the time being should pay the clear residue of the revenues to the Ecclesiastical Commissioners, after reserving thereout such sums of money as should have been expended with the approbation of the bishop in the necessary repairs of such parts of the cathedral and of *St. Mary's* church in *Manchester* as they were liable to keep in repair out of their revenues, and also all such other necessary and proper expenditure as might lawfully devolve upon them. By sect. 23 the Commissioners were to apply the moneys paid to them in making compensation to any person whose vested rights should have been injured by the Act; and next "in the payment of such yearly or other sum or sums of money as to the said Commissioners shall seem fit to each and every or any one or more of the rectors, incumbents, or ministers of the rectories, parishes, or districts now existing or hereafter to be constituted within the parish of *Manchester*," save to the Dean, "in addition to the other endowments," and other fees belonging to them. It was provided that no incumbent should in any one year be paid by the Commissioners more than would be sufficient, with his other endowments, to make up his income to £150 for that year, exclusive of fees and dues, until all such incumbents should be in the receipt of that income from the endowments of their respective incumbencies, and the payments made by the Commissioners, and "so soon as each and every of such incumbents shall be in the receipt of" such income, the Commissioners "shall proceed in like manner to increase such incomes until each and every of such rectors," &c., shall be in the receipt of the yearly income of £250.

By sect. 24, the Commissioners were, after answering the abovementioned purposes, to accumulate the surplus moneys received by them for the purpose of raising a fund for the permanent endowment of each of the incumbents, and power was given to them to invest such moneys as therein mentioned.

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By sect. 35, it was enacted "that the Dean and Canons and their successors shall yearly and every year render to the said Ecclesiastical Commissioners an account annually at Easter of the receipts and disbursements in respect of the said tithes, lands, hereditaments, and estates vested in the said Dean and Canons for the year ending at the Christmas next preceding, stating therein all the particulars and items of such receipts and disbursements in such form and to be so verified as the said Ecclesiastical Commissioners shall direct, and that it shall be lawful for the said Ecclesiastical Commissioners from time to time or at any time or times to appoint any agent or agents, accountant or accountants, to inspect all papers, writings, and documents relating to such tithes, lands, hereditaments, estates, and accounts, and to take copies of or extracts from the same or any of them, and that one copy of such annual account shall be transmitted by the said Commissioners to the bishop of the diocese, and the said Commissioners shall cause an abstract of the same to be deposited in the registry of the said diocese of *Manchester* for the time being."

The Plaintiffs alleged that the present Dean and Canons had been appointed since 1850; that the gross revenues had very much increased since that year, that many new district parishes had been formed and churches built, and that the accounts rendered by the Dean and Canons for the year 1878 shewed that their expenditure had so increased that the Commissioners were unable to make any grants to the incumbents of the new churches, and also prevented from making any increase in the grants to the incumbents of the districts previously constituted. They stated that on examining the accounts which had been rendered by the Dean and Canons to the Commissioners under the 35th section, and which were set forth, there were many items of disbursement which ought not to be allowed, and they particularly objected to the salaries paid to the bursar, collector of rents, and registrar, those offices being held by the canons themselves; also to the sums paid to the singing men and boys, other than the four men and four boys provided for by the charter; and to the salaries paid to the master of the choristers' school, the precentor and clerk in orders; and to the sums expended in establishing a choristers' school; and in respect of the repairs of the cathedral and other expenses. In 1878 the revenues were returned at £25,984 16*s.* 3½*d.*, and the surplus payable to the Commissioners at £13,878 18*s.* 11*d.*, and in 1879 the sums were £25,239 7*s.* 11½*d.* and £14,104 2*s.* 9*d.* respectively. The Plaintiffs also alleged that many of the items of expenditure in 1878 were not lawfully payable out of the revenues; also that the accounts rendered by the Dean and Canons for the years preceding 1879 did not give sufficient details of the miscellaneous expenditure, and they desired that inquiries should be directed for the purpose of ascertaining the nature of such expenditure, and that necessary declarations should be made for determining what expenditure out of the revenues might consistently with the Act of 1850 be allowed by the Commissioners. The Plaintiffs had applied to the Commissioners requesting them to take proceedings against the Dean and Canons to check their expenditure, but they declined to do so, and the Plaintiffs could only obtain redress and enforce a due compliance by the Dean and Canons with the provisions of the Act of 1850 by applying to the Court.

They claimed declarations that the Dean and Canons were not at any time since the passing of the Act of 1850, and that they and their successors were not and would not be entitled to pay to the canons, or to the minor canons or chaplains, out of the revenues more than the incomes of £600 and £250 respectively, as provided by the 14th section, and that any sums paid to the canons or minor canons, as bursar, registrar, collector of rents, or otherwise, ought to be disallowed; that the Dean and Canons were not entitled to apply any part of the revenues in paying the rent of or furnishing or maintaining the school-house, used for the purpose of a choristers' school, or in paying any salaries to the master of it, or to any precentor or clerk in orders employed by or holding office under them, or in paying the salaries of more than four each singing men and boys, according to the charter, or in paying so much of the repairs of the cathedral or of the items of miscellaneous expenditure as might not, in the opinion of the Court, be lawfully payable out of the revenues; also an injunction restraining the Dean and Canons from making any payments to any of the canons, and to any of the other persons, or for any of the purposes referred to, or for any purposes, out of the revenues, except as were provided by the 14th section; an order directing the Dean and Canons to pay the future surplus revenues to the Commissioners in accordance with the declarations to be made as claimed; and a writ of mandamus or order of the Court directing the Dean and Canons to render for the future, in compliance with the 35th section, accounts of the receipts and disbursements in respect of the tithes, lands, hereditaments, and estates vested in them, stating therein all the particulars and items of both, and the purposes for which the latter were made, and, in particular, directing them in their past and future accounts to give further particulars to the Plaintiffs and the Commissioners of such items of expenditure as were referred to in the accounts which had been rendered under the heads of "collectors, bursars, registrars, surveyors' accounts, solicitors and land agents' charges," also "salaries of clerks in orders, precentor, master of choristers, organist, singers, and college officers," or other such or similar general items of expenditure as had appeared in the accounts so rendered, including the names or name of the persons or person who had from time to time received any part of the sums charged under such items, and all necessary declarations and orders for ensuring compliance by the Dean and Canons with the 35th section in the future accounts to be rendered by them.

The Plaintiffs asked for leave, if necessary, to use the name of the Commissioners in any action or other proceedings which might be necessary against the Dean and Canons for obtaining any part of the foregoing relief which could not, in the judgment of the Court, be obtained in this action, and without such further proceedings, and they asked for payment by the Defendants, or some of them, of the costs of the action.

The Defendants demurred separately, the former on the ground that by the Act they were amenable to account only to the Ecclesiastical Commissioners, and that the jurisdiction of the Court was therefore expressly excluded; and the latter on the ground that, as their only duty was to receive the surplus handed to them by the Dean and Canons, and as no relief was sought against them directly, they were not properly parties to the action; and the former also demurred on the ground that no order or certificate of the Charity Commissioners authorizing the action had been obtained from them under the provisions of the *Charitable Trusts Act*, 1853 (16 & 17 Vict. c. 137), s. 17.

Kay, Q.C., *Romer*, Q.C., and *Cozens-Hardy*, for the Dean and Canons:—

The revenues are a charitable trust. The Plaintiffs do not ask for the administration of any trusts. The right of action, if any, on the part of the Plaintiffs to have an account would be that they are in effect *cestuis qui trust* of a residuary trust fund. The case seems to have been founded upon *dicta* in the case of *Jerdein* v. *Bright* (1); but the proper course would have been to bring an action for the administration of the fund; the Plaintiffs, however, in effect say, "We have asked the trustees—the Ecclesiastical Commissioners—to sue the debtor, and as they have refused to do so we do it." Now, unless there were special circumstances, and none exist here, the Plaintiffs have no justification for the course which they have taken. Neither in relation to trust property, nor in any other way, have they a right to call upon a debtor to render an account to the trustees: *Yeatman* v. *Yeatman* (2). There are no suggestions of collusion or fraud in this case. The Plaintiffs ought not to have commenced this action before obtaining the consent of the Charity Commissioners under the 17th section of the *Charitable Trusts Act*, 1853, as they have no interest in the property of the Dean and Canons, but only in the surplus revenues which were ordered to be paid to the Ecclesiastical Commissioners. The Dean and Canons, in whom the whole of the property is vested, are, as the colleges at *Oxford* and *Cambridge*, an incorporated and collegiate institution, and have to carry out the special provisions of their charter. Any question as to whether they have done their duty or not should be left for the determination of the visitor—the Bishop of *Manchester*—as where one has been appointed, he has jurisdiction to remedy any abuse in the application of the revenues for collegiate purposes, and this Court will not interfere: *Attorney-General* v. *Smart* (3); *Attorney-*

(1) 2 J. & H. 325, 333.

(2) 7 Ch. D. 210.

(3) 1 Ves. Sen. 72.

General v. *Middleton* (1); *Attorney-General* v. *Magdalen College, Oxford* (2); *Attorney-General* v. *Dulwich College* (3). There is no trust in the Dean and Canons for any charity. Such being the position of the Dean and Canons under their charter, the statute 13 & 14 Vict. c. 41 was passed which enacted that they should, after providing for their own institution in the manner prescribed, pay over the surplus revenues to the Ecclesiastical Commissioners for their administration, and that has been done. It is under the Act an endowment and charitable trust, and if the Plaintiffs seek to enforce it they must obtain the sanction of the Charity Commissioners. The Plaintiffs complain of the conduct of the Ecclesiastical Commissioners, and say that they have not performed their duty. If that be so, their remedy is not by action for breach of duty on the part of this public body who have to adminster a public trust, but they should apply to the Court for a writ of mandamus against them. Assuming that the Plaintiffs have that right, it would not justify them in bringing an action against the Commissioners, and joining the Dean and Canons in the statement of claim: *Glossop* v. *Heston and Isleworth Local Board* (4). The only writ of mandamus asked for here is against the Dean and Canons, but they are not a public body, or a charitable body, and therefore the granting of such an application against them would not be justified. Their rights, which existed previously to the 13 & 14 Vict. c. 41, still remain, excepting so far as they have been taken away by that statute, which must be construed strictly. The Dean and Canons have to account to the Ecclesiastical Commissioners and to them alone, and if they do that they preserve all their prior rights, and are not bound to account to the Attorney-General, or to any one else. They have accounted to the Ecclesiastical Commissioners for all their receipts and their expenditure, which they contend has been rightly and properly incurred. On these grounds their demurrer ought to be allowed.

Robinson, Q.C., and *B. B. Swan*, for the Ecclesiastical Commissioners:—

Though the grounds of their demurrer are in some respects

(1) 2 Ves. Sen. 327.
(2) 10 Beav. 402.
(3) 4 Beav. 255.
(4) 12 Ch. D. 102.

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different, yet the Ecclesiastical Commissioners avail themselves of the argument that the sanction of the Charity Commissioners should have been obtained.

The Ecclesiastical Commissioners have considered that they had not sufficient grounds to require them to impeach the accounts rendered. The expenditure by the Dean and Canons upon their cathedral is less than upon any other like institution in the kingdom. It is for the Bishop of *Manchester*—the visitor—to determine whether the expenditure is in any respect improper, whether for carrying on the services in the cathedral or otherwise. The Commissioners do not complain of what has been done. There is no direct relief sought against the Commissioners, and they have been improperly made Defendants to the action. Their demurrer too ought to be allowed.

Hastings, Q.C., and *Grosvenor Woods*, for the Plaintiffs:—

The sanction of the Charity Commissioners is not necessary, under sect. 17, for the reason that, this being a collegiate foundation, it plainly comes within the provisions of sect. 62 of the *Charitable Trusts Act*, 1853. It may be said that the case of *Attorney-General* v. *Sidney Sussex College* (1) is a decision to the contrary, but it would seem that that case was not fully argued. Sect. 63 of the Act, which empowered the exempted charities to apply by petition to the Commissioners to have the benefit of the Act, and come within sect. 17, was not brought to the attention of the Court. Sect. 63 has since been repealed. If that case should be considered to be against the Plaintiffs, the decision in *In re Meyrick's Charity* (2) may be relied upon, as it was held there that, so far as the charity was for the college, sect. 17 did not apply. It is, however, a misapprehension to say that only a certain surplus of the revenues is affected, as the Act expressly provides for the dealing with all the property out of which the revenues come.

It is not every action which has reference to charity that requires the sanction of the Charity Commissioners under the 17th section: *Holme* v. *Guy* (3). The Dean and Canons have, by the 35th section of the statute 13 & 14 Vict. c. 41, a duty cast upon them to account to the Ecclesiastical Commissioners. If they do not render an account in conformity with that section, a writ of mandamus can be applied for, and this Court has full jurisdiction to issue it: *In re Paris Skating Rink Company* (1), and also to grant a prohibition: *Hedley* v. *Bates* (2).

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(1) 15 W. R. 162.
(2) 1 Jur. (N.S.) 438.
(3) 5 Ch. D. 901.

The argument that the visitor is the proper person to make inquiries is not sound, as he has no jurisdiction in the matter. The duty to call for accounts has been cast upon the Ecclesiastical Commissioners, but that does not oust the jurisdiction of this Court: *Attorney-General* v. *Corporation of Dublin* (3); *Attorney-General* v. *Governors of Dedham Grammar School* (4).

It is submitted that, as the surplus revenues must be accounted for to the Ecclesiastical Commissioners, the case is plainly distinguishable from those which come within the *Charitable Trusts Act*, but the Ecclesiastical Commissioners will not exercise their power, or interfere with the Dean and Canons—they merely receive the accounts, and then say their functions are discharged. It is submitted that on the merits a case has been made against the Commissioners, and that the decision in *Yeatman* v. *Yeatman* (5) is not opposed to the course which the Plaintiffs have pursued. If it should be considered that the sanction of the Charity Commissioners is necessary for proceedings in reference to the revenues of a collegiate foundation, questions of jurisdiction may be raised between the two boards of Commissioners, but the property out of which this surplus arises belongs to a collegiate institution which is exempted from the jurisdiction of the Charity Commissioners. All that the Plaintiffs want to enforce is a right against the Ecclesiastical Commissioners to compel them to require the Dean and Canons to render their accounts in a proper manner to the Commissioners: *Reg.* v. *Commissioners of the Port of Southampton* (6); *Glossop* v. *Heston and Isleworth Local Board* (7).

The Attorney-General can come to any Court to enforce a legal demand. There is no complaint here of the management of any charity. There is no complaint of maladministration by the Ecclesiastical Commissioners of the surplus fund paid to them, but the complaint is that the Commissioners have misunderstood their duty in not obtaining from the Dean and Canons full accounts of all their receipts and expenditure. The Plaintiffs do not attempt to interfere with the administration of the property, and therefore it is not a case in which they should be compelled to obtain the sanction of the Charity Commissioners before proceeding with the action.

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(1) 6 Ch. D. 731.

(2) 13 Ch. D. 498.

(3) 1 Bli. (N.S.) 312.

(4) 3 Jur. (N.S.) 325.

(5) 7 Ch. D. 210.

(6) Law Rep. 4 H. L. 449.

(7) 12 Ch. D. 102.

HALL, V.C.:—

On this point, in reference to the consent of the Charity Commissioners, notwithstanding the argument which has been addressed to me, that this being an action for a mandamus, it is one which it is competent to the Court to deal with, my original impression, that the action ought not to be allowed to go on without the consent of the Commissioners being obtained, remains unaffected.

The argument, founded on the fact that a mandamus is asked for here, is one which, with reference to the point I am now considering, I cannot appreciate. I do not think it necessary for present purposes to consider the form of this statement of claim, which seeks a mandamus against the Dean and Canons, because it appears to me that, even though it were the only relief sought for, the matter would still be left within the operation of the 17th section of the *Charitable Trusts Act*, 1853. There is nothing in the language of the section to distinguish the case of a mandamus, because it is a "proceeding," and that being so, I think that it is unnecessary to say more in regard to it. It was argued that the case of *Glossop* v. *Heston and Isleworth Local Board* (1) is distinguishable and inapplicable to this case. In the view which I take, it is beside the question to consider whether that be so or not. Nothing has been said which satisfies me that I should ever grant a mandamus in this case, having regard to what was said in that case.

It was contended that the operation and effect of the 62nd section of the *Charitable Trusts Act* must be ascertained by resorting to the 63rd section, and that the latter section was overlooked in the case of *Attorney-General* v. *Sidney Sussex College* (2). The 63rd

(1) 12 Ch. D. 102.

(2) 15 W. R. 162.

section cannot have any bearing upon this case, because it was repealed by the subsequent statute, 32 & 33 Vict. c. 110. But of course the observation remains that the 63rd section was not repealed when that case was heard and decided, therefore the criticism would be correct in reference to that case if it were founded on a sound and just construction of the section. But I cannot think that it was so. It would be a very odd thing to say that you might exclude the operation of the 62nd section by resorting to a petition to the Charity Commissioners to exempt the particular body from the operation of the 62nd section. The 63rd section was never meant to be addressed to such a process as that so as to exclude the operation of the 17th section, which, as it appears to me, clearly embraces such a case as that with which I have now to deal. In reading the 17th section I was very much struck with the number of things which are contained in it pointing to the Charity Commissioners exercising a guarded and careful jurisdiction in reference to the institution of proceedings in the case of charities. They are authorized to qualify their order sanctioning proceedings with all such stipulations or provisions as they may think fit, and to stop the proceedings, and so forth, shewing that it was meant to give them a very large discretion, and that they had a very important duty in reference to the administration of charities in giving or withholding leave. Therefore, in a case like this, I can by no means either take it for granted that that was a mere form, or think it otherwise than a very serious matter to go before them; and I have no doubt it will be carefully considered by them.

It was said, however, that the case of *Holme* v. *Guy* (1) is an authority that such a case as this is not within the provisions of the Act. It appears to me that all the remarks of the Master of the Rolls in that case, instead of tending to shew that this is not a case within the Act, shew clearly that it is within it. The evil of having proceedings taken in such a case which might lead to no good result is one which must be carefully borne in mind and considered.

Supposing this was the hearing of the action and a final order was about to be made, what would have to be done? I

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(1) 5 Ch. D. 901.

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should probably, if the Plaintiffs were entitled to judgment, have to send this case to a referee to investigate all the accounts and to ascertain a number of things—for instance, whether the organist was paid too much, or whether there were too many choristers—all that sort of inquiry would have to be made somewhere, because of course it could not be made here. The Plaintiffs might establish some particular cases of misapplication of funds—there are, indeed, two or three questions pointedly raised upon which I am asked to make specific declarations of misapplication of funds by the Defendants—the Dean and Canons—who have to pay them over, and those particular points so raised might be dealt with, but all the other matters which are sought to be gone into could not be decided in Court. Mr. *Grosvenor Woods* has disclaimed that this is an action for the administration of the trusts of the charity at all. He says it is a suit instituted for the purpose of obtaining a direction that proper accounts shall be delivered to some persons to whom they ought to be delivered, which accounts, it is alleged, have not been delivered in proper form; and also for the purpose of obtaining an order that proper accounts shall be delivered by the Dean and Canons to the Plaintiffs, to whom they are not by the statute ordered to deliver or required to deliver any accounts at all. These are difficulties which, from the nature of the case, have to be dealt with; but all these things I refer to only for the purpose of shewing that the case is one clearly within the 17th section, if it be not within the 62nd section, of the Act; and that it is very desirable that there should be such a jurisdiction, as it is contended exists under the 17th section applicable to the case.

Such being my view as to that, the question as to the operation of the 62nd section really depends on the effect of the authorities. I should have decided this case, as I now do, without any authority; but I myself consider that it is decided by the cases *In re Meyrick's Charity* (1) and *Attorney-General* v. *Sidney Sussex College* (2), to which reference has been made. The former case was referred to as an authority by the Plaintiff's counsel for the proposition that the 17th section is not applicable, but I consider that it is an authority which shews that the section exactly applies to a case of this sort. That case was considered to be one which had reference to a charity which came entirely within the provisions of the 62nd section. The Vice-Chancellor *Kindersley* said the reasonable way was to look at the object of the application. His words were: "If it is to affect matters of which the college is the object, then you need not go before the Commissioners; but if it is to effect an end of which another charity is the object, then it would be necessary to go before the Commissioners." Is not the present case one in which the result of the action would be to effect an end which another charity is the object of—that charity being these relators and the other rectors and vicars on whose behalf they represent themselves as suing? That undoubtedly is so, and although it involves an inquiry into what the fund is which ought to be transferred to the Ecclesiastical Commissioners to be dealt with, the real object is plainly to have administered partially, or to some limited extent, or to obtain some special or peculiar or limited relief in respect of, the funds which are the subject of the charity, and with which, in fact, the Dean and Canons cease to have any concern after the moneys are handed over by them. The object is to have the proper amount handed over for the purpose of charity from the hands of the persons who receive it—the Dean and Canons—and who, it is alleged, have not rendered proper accounts. This case appears to me, therefore, to be plainly within the principle of *In re Meyrick's Charity* (1). The other case which I have mentioned is exactly in harmony with it, and in fact it was admitted that that case is an authority against the Plaintiff's proceeding with this action without the leave of the Charity Commissioners; but there was an attempt to weaken the force of that admission in the way which I have stated.

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(1) 1 Jur. (N.S.) 438.

(2) 15 W. R. 162.

Upon the whole, it seems to me that I cannot now proceed any further with the action. I should not have been at all unwilling to hear the case once for all, but I do not think it right to do so. Taking this view, I think the right course to adopt, under all the circumstances of the case, will be to withhold actual judgment upon the demurrers and order them to stand over, although, no doubt, my opinion is that it was wrong to bring the action with-

(1) 1 Jur. (N.S.) 438.

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out the consent of the Commissioners. If their consent should not be obtained I shall allow the demurrers, but I shall not give judgment at present.

May 9. The application which was made to the Charity Commissioners having resulted in their formal consent to the prosecution of the action being given, the case was now brought again before the Court, and after a short statement of what had occurred, the Vice-Chancellor gave judgment, holding that the case, whether considered as one of charity or of trust, was within the inherent jurisdiction of the Court; that the Ecclesiastical Commissioners, being interested in the mode in which the accounts of the revenues of the Dean and Canons should be taken, were rightly made Defendants, and that the demurrers must be overruled (1).

Solicitors: *Cunliffe, Beaumont, & Davenport,* agents for *Cunliffe, Leaf, & Co., Manchester; Clarke, Woodcock, and Ryland,* agents for *Orford & Milne, Manchester; Jennings White & Buckston.*

T. F. M.

V.-C. H.
1881
May 14.

GRANGE *v.* WHITE.

[1881 G. 827.]

Practice—Partition Act, 1876 (39 *&* 40 *Vict. c.* 17), *s.* 6—*Request for Sale by Married Woman.*

The request for a sale in a partition action, when made on behalf of a married woman, should be a writing signed by her authorizing and requesting her solicitor to instruct counsel to ask for a sale.

PARTITION ACTION.

A husband and wife were co-Plaintiffs, and the parties desiring a sale, the only question was how the request for a sale should be made by the married woman.

Bardswell, for the Plaintiffs:—

I suggest that the order should be in the form adopted by

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(1) An appeal by the Defendants from the judgment of the Vice-Chancellor came on to be heard before the Court of Appeal on the 22nd of June, and their Lordships were unanimously of opinion that it should be dismissed.

Vice-Chancellor *Bacon* in *Crookes* v. *Whitworth* (1), *i.e.*, prefaced by the words, the married woman "by her counsel duly authorized requesting a sale." I must mention, however, that in a more recent case of *Wallace* v. *Greenwood* (2), *Jessel*, M.R., considered that the request should be made by some one separately and specially authorized on behalf of the married woman, and if your Lordship takes this view, I propose that the solicitor for the Plaintiffs should be specially authorized to make the request on her behalf.

He also referred to *Rimington* v. *Hartley* (3).

Methold (as *amicus curiæ*):—

In a similar case your Lordship accepted as sufficient a written request by a married woman authorizing me as her counsel to ask for a sale.

A. C. Sim, for the Defendants.

HALL, V.C.:—

I think there should be a request in writing signed by the married woman authorizing and requesting her solicitor to instruct counsel to ask for a sale; and I shall direct accordingly.

Solicitors: *Burton, Yeates, Hart, & Burton*, agents for *Parker & Parker, Thame.*

(1) 10 Ch. D. 289. (2) 16 Ch. D. 362. (3) 14 Ch. D. 630.

W. W. K.

FRY, J.
1881
May 21.

In re SPILLER.
SPILLER *v.* MADGE.

[1879 S. 287.]

Will—Construction—Lapse—Contingent Legacy.

A testatrix gave the residue of her estate equally between a number of persons whom she named, and such of the children of *J. G.* as were living at the date of her will. *J. G.* had died before the date of the will and had left no children:—

Held, that there was no lapse of the share given to the children of *J. G.*, but that the whole residue was divisible among the other persons named.

Re Hornby (1) followed.

THIS action was brought for the administration of the estate of *Elizabeth Spiller*, who died on the 9th of April, 1879. She by her will, dated the 13th of January, 1845, directed her trustees to stand possessed of the residue of the proceeds of her estate, upon trust to divide the same in equal shares between the following persons, (that is to say) *Sarah* the wife of *John White*, such of the children of *John Gale*, her late deceased uncle, as were living at the date of her will, the six children of her aunt, *Sarah Baker* (naming them), the two children of her late deceased uncle *Joel Spiller* (naming them), the four surviving children of her uncle *Robert Spiller* (naming them), and *Elizabeth Perry*, the said several residuary legatees to take *per capita* and not *per stirpes*. On the 1st of August, 1879, judgment was given for the administration of the estate, and various inquiries and accounts were ordered to be made and taken. The Chief Clerk, by his certificate dated the 15th of March, 1881, found that the testatrix had at the date of her will no uncle living named *John Gale*, and that her uncle of that name died in her lifetime, viz., on the 26th of January, 1842, and that he left no children or child. The action now came on for further consideration, and one of the questions for decision was whether the share in the residue, given by the will to such of the children of *John Gale* as were living at the date of the will, had lapsed, so that the next of kin of the testatrix were entitled to it, or whether the whole of the residue was divisible among the other persons named as residuary legatees.

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(1) 7 W. R. 729.

J. Pearson Q.C., and *Cecil Russell*, for the Plaintiff:—

There is no lapse. There being no children of *John Gale* at the time when the will was made, the residue is divisible among the other persons who are named as residuary legatees.

In *Re Hornby* (1), a testator bequeathed his residue to *A.*, *B.*, *C.*, and *D.*, if living. *D.* was dead at the date of the will, and it was held by Vice-Chancellor *Wood* that the gift to *D.* was contingent upon his being alive, and that there was no lapse, but that the residue went to *A.*, *B.*, and *C.* That is very like the present case.

G. Curtis Price, for the next of kin:—

There is a lapse of the share of the residue which is given to the children of *John Gale*. The gift is not to a class, but to a number of persons *nominatim*. In *Re Chaplin's Trust* (2), a testator bequeathed his residue equally between all and every the children of his late cousins *R.* and *B.* as should be living at the time of his death, and ten other persons by name. One of the ten died in the lifetime of the testator, and Vice-Chancellor *Wood* held that her share had lapsed for the benefit of the testator's next of kin.

N. R. Smart and *Hornell*, for other parties.

FRY, J.:—

In my opinion there is, as Mr. *Russell* has well put it, no intestacy, because there is no gift; the gift is to such of the children of *John Gale* as were then living. There was no such child, and therefore no gift. *Re Hornby* is exactly in point, if any authority is necessary. I read the clause as a direction to divide the residue among a number of persons named, and the children of *John Gale*, if there were any living at the date of the will. There were no children of *John Gale* living at that date,

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(1) 7 W. R. 729.

(2) 12 W. R. 147.

FRY, J.
1881
In re SPILLER.
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and therefore there is no gift to the children of *John Gale*, and the residue is divisible among the other persons who are named.

Solicitors: *Bowlings, Foyer, & Hordern*, agents for *Stamp & Son, Honiton; E. F. Sealy.*

W. L. C.

FRY, J.
1881
June 20, 21.

BARKSHIRE *v.* GRUBB.

[1877 B. 98.]

Easement—Right of Way—Owner of two Tenements—Grant of one Tenement "together with all Ways now used and enjoyed therewith."

A grant by the owner of two tenements of one of them, "together with all ways now used or enjoyed therewith," will pass to the grantee a right of way over a clearly defined path constructed over the other tenement, and at the date of the grant actually used for the purposes of the tenement which is granted, even though the path did not exist prior to the unity of possession.

Thomson v. *Waterlow* (1) and *Langley* v. *Hammond* (2), so far as they are contrary to this view, must be taken to have been overruled by *Watts* v. *Kelson* (3) and *Kay* v. *Oxley* (4).

In the year 1832 *John Grubb* died intestate, leaving his son *Thomas Grubb*, his heir-at-law, surviving him. He also left *Elizabeth Grubb*, his widow, and four other children, viz., *William Grubb, Elizabeth Grubb, Mary Grubb,* and *Hannah Grubb.* On the 16th of May, 1834, *Thomas Grubb* executed a deed, whereby he covenanted that he would stand seised of certain land, which had descended to him from his father, to the use of his mother during her life, and after her death to the use of himself and such of his four brothers and sisters as should be living at the death of the mother, and to the use of the respective heirs of himself and such of his brothers and sisters as should be living at the death of the mother, in equal shares as tenants in common. The mother died in the year 1863. The daughter *Hannah* had died before her. *Elizabeth Grubb* had married *Thomas Martin. Mary Grubb* married one *Andrews*, and he had died before the mother. The land which had descended to *Thomas Grubb* from his father consisted of three portions, all adjoining, which may be described as the green, the pink, and the blue portions, they being respectively distinguished by those colours in a plan annexed to a deed of the 5th of November, 1863, which will be presently stated.

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(1) Law Rep. 6 Eq. 36.
(2) Ibid. 3 Ex. 161.
(3) Law Rep. 6 Ch. 166.
(4) Ibid. 10 Q. B. 360.

The green portion contained 11 perches; the pink and blue portions together contained 1R. 15P. On the pink and blue portions stood a double cottage, or building divided into two cottages. This building stood to the east of a highroad from which it was separated by part of the pink land. The eastern cottage (the one farthest from the highroad) stood on the blue portion; the western cottage stood on the pink portion. Access from the highroad to both the cottages was obtained by a clearly defined gravelled path which had been constructed over that part of the pink portion which separated them both from the highroad, and led to the south end of the building, and at the date of the agreement now about to be stated and of the deed of the 5th of November, 1863, this path was the only mode of access to both the cottages from the highroad. The gravelled path had been constructed during the unity of possession of the pink and blue portions.

After the death of the mother a verbal agreement was come to between *Thomas Grubb* and his brother and two then surviving sisters, that the land comprised in the deed of covenant of 1834 should be partitioned as follows, viz., that the green portion should be conveyed to *Thomas Grubb* in fee; that the pink portion should be conveyed to *William Grubb* in fee; that the blue portion should be conveyed to *Elizabeth Martin*, or a trustee for her, in fee; and that £50 should be paid to *Mary Andrews* for her share of the land.

The deed of the 5th of November, 1863, was executed to carry into effect this agreement. The deed was made between *Thomas Grubb* of the first part, *William Grubb* of the second part, *Thomas Martin* and *Elizabeth* his wife of the third part, *Mary Andrews* of the fourth part, and *William Malyon* of the fifth part, and by it, in consideration of the sum of £50 paid by *Thomas Martin* and *William Grubb* in equal moieties to *Mary Andrews*, the green, pink, and blue portions of the land were, together with (*inter* *alia*) all ways, rights, privileges, easements, advantages, and appurtenances whatsoever to the same or any part thereof appertaining, or with the same or any part thereof then or theretofore enjoyed or reputed as part thereof or appurtenant thereto, granted to *Malyon*, his heirs and assigns, to hold the green portion to the use of *Thomas Grubb* in fee, and to hold the pink and blue portions as to one undivided moiety thereof to the use of *William Grubb* in fee, and as to the other undivided moiety, to such uses as *Elizabeth Martin* should, notwithstanding coverture, by will appoint, and in default of appointment to the use of *Malyon* and his heirs during the life of *Elizabeth Martin*, in trust to allow her and her assigns to hold the same and take the rents and profits thereof for her separate use, with remainder to the use of *Elizabeth Martin*, her heirs and assigns. After the execution of this deed the blue land with the cottage which stood on it was occupied by *Elizabeth Martin* and her husband, and the pink land and the cottage which stood on it was occupied by *William Grubb*. The gravelled path was for some time used as the mode of access from the highroad to *Elizabeth Martin's* cottage, but subsequently *William Grubb* stopped up this path, and prevented *Elizabeth Martin* and her family from using it. An agreement was then entered into by which she was allowed by *William Grubb* another mode of access over another part of the pink land, for which she paid him a rent of 1*s*. a year. He subsequently put an end to this arrangement, and then she was for a time allowed by a neighbour to pass over his land between her cottage and the highroad. This permission was afterwards withdrawn, and she was compelled, in order to obtain access to the highroad, to purchase a right of way over some other adjoining land.

This action was commenced in 1877 by *Elizabeth Barkshire* (formerly *Martin*), (her husband *Thomas Martin* having meanwhile died and she having married *James Barkshire*), against *William Grubb*, *James Barkshire*, and *William Malyon*, claiming to have a partition made of the pink and blue portions of the land, or to have the same sold and the proceeds divided, or at the option of the Defendant *William Grubb* to have the indenture of the 5th of November, 1863, rectified so as to carry out the terms of the prior agreement, and to vest in the Plaintiff, or a trustee for her, in fee the blue part of the land, together with a right of way over the gravelled path which had been stopped up, and to vest in the Defendant *William Grubb* the pink part of the land, subject to the right of way.

Glasse, Q.C., and *Yate Lee*, for the Plaintiff.

Northmore Lawrence, for the Defendant *W. Grubb* :—

During the unity of possession no right of way over the path could exist. No agreement to give the Plaintiff a right of way over the path is proved, and, if she is entitled to it, her right can only be an implied one arising out of the grant to her of the blue land by the owner of the pink and the blue. But a grant of one tenement by the owner of two only passes continuous easements on or over the tenement which he retains; it does not pass a discontinuous easement, such as a right of way, unless it is a way of necessity: *Watts* v. *Kelson* (1); *Thomson* v. *Waterlow* (2); *Langley* v. *Hammond* (3).

[FRY, J.:—*Kooystra* v. *Lucas* (4) seems to be an authority against you.

Glasse, Q.C., referred to *Kay* v. *Oxley* (5).]

Thomson v. *Waterlow* was followed in *Langley* v. *Hammond*, and both cases were referred to in the judgment of the Court of Appeal in *Watts* v. *Kelson* without any disapproval.

If the Plaintiff was at first entitled to a right of way of necessity over the gravelled path, the necessity ceased when she obtained another mode of access, and the right then ceased and could not afterwards arise again.

All ways are extinguished by unity of ownership, and a way of necessity arising afterwards is a new easement, and it is limited by the necessity and ceases with it: *Holmes* v. *Goring* (6): *Gale* on Easements (7). To some extent that was doubted in *Proctor* v. *Hodgson* (8), but the doubt was expressed only in a *dictum*.

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(1) Law Rep. 6 Ch. 166, 173.
(2) Ibid. 6 Eq. 36.
(3) Ibid. 3 Ex. 161.
(4) 5 B. & A. 830.
(5) Law Rep. 10 Q. B. 360.
(6) 2 Bing. 76, 83.
(7) 5th Ed. p. 147.
(8) 10 Ex. 824, 828.

[FRY, J.:—I thought that the necessity must be judged of at the date of the conveyance. But the proposition laid down in *Holmes* v. *Goring* (1) seems to have been only a *dictum*, for there appears to have been no necessity at the date of the grant.]

Holmes v. *Goring* has never been overruled.

At any rate, if the Plaintiff ever had the right of way which she claims, the evidence shews that she has abandoned it.

Whitaker, for the Defendant *Malyon*.

G. Murray, for the Plaintiff's husband.

Glasse, in reply.

FRY, J., after stating the facts as above mentioned, continued:—

The first question which arises is, upon this state of facts and upon such an executory agreement, how ought the conveyance to carry into effect the agreement to have been framed? Ought it or ought it not to have comprised a grant of a right of way from the highroad over the pink land to the blue along the gravelled path to the south end of the double cottage? In my opinion the deed ought to have contained such a grant. In the first place, I must observe that the contract was an executory one, and in construing such a contract the Court will have regard to the facts existing at the date of the contract. In determining how the conveyance ought to be framed, the Court could not exclude from its consideration the fact that the gravelled path was actually used as the mode of access from the road to the cottages. Further, I must observe that from the evidence it appears that there was in fact at that time no other path leading from the highroad to the cottages, and upon the scheme of the agreement there was no other which could well be used for access to the blue land, for that land was on all sides surrounded either by the pink or by the property of strangers. Therefore, in my opinion, the deed to carry into effect the agreement ought to have contained a grant of a right of way to the Plaintiff over the gravelled path. But I will go a little further and will suppose that the

(1) 2 Bing. 76, 83.

deed executed in pursuance of the agreement, instead of expressly granting the right of way, had contained only the ordinary general words; would those words have passed this right of way? I think that among the general words would have been found a grant of "all ways now used or enjoyed with" the blue land. Then the simple inquiry would have been, was the way in question, at the time of the execution of the deed, used or enjoyed with the blue land? If it was, it would have passed by the deed; if it was not, it would not have passed. I have already found upon the evidence that the way was used at the time with the blue land, and therefore, in my opinion, it would have passed under those general words. The authorities on the point go back a long way. In *Comyn's* Digest, tit. "Chimin" (1), it is said, "If a man seised of *Blackacre* and *Whiteacre* uses a way through *Whiteacre* to *Blackacre*, afterwards grants *Blackacre*, with all ways, &c., this way through *Whiteacre* shall pass to the grantee." And the same rule prevailed in *Kooystra* v. *Lucas* (2). There Mr. Justice *Holroyd*, in delivering judgment, said, "By the lease certain premises delineated in a plan in the margin thereof, comprising a part of *Sprang's* dairy, were demised to the plaintiff, 'together with all ways thereto belonging or appertaining, or therewith or with any part thereof used or enjoyed.' The way in question was a way used and enjoyed with a part of the demised premises. It therefore passed to the plaintiff by the very words of the lease." These authorities would seem to be quite clear, but for the two later cases of *Thomson* v. *Waterlow* (3) and *Langley* v. *Hammond* (4), which, I think unfortunately, introduced a distinction into the law on the question. They have given some countenance to the proposition that when the general words used in a grant of land are, "together with all ways therewith now used, occupied or enjoyed," and there is a road then actually used with the land granted which has been constructed over adjoining land of the grantor, but such road did not exist before the unity of possession, a right of way over that road will not pass: but that will pass only if the road had existed before the unity of possession. One asks, why, on principle, should this distinction exist? If the way is actually used at the time when the grant is made, why should it not pass by the grant? And accordingly the doubt which was introduced by those cases seems, I am happy to say, to have been dispelled by the cases of *Kay* v. *Oxley* (1) and *Watts* v. *Kelson* (2), which have restored the law as it had been settled by the earlier decisions. In *Kay* v. *Oxley*, Lord *Blackburn* said (3), "It cannot make any difference in law whether the right of way was only *de facto* used and enjoyed, or whether it was originally created before the unity of possession, and then ceased to exist as a matter of right, so that in the one case it would be created as a right *de novo*, in the other merely revived. But it makes a great difference, as matter of evidence on the question whether the way was used and enjoyed as appurtenant." And in *Watts* v. *Kelson*, which was the earlier in date, the Judges of the Court of Appeal seem to have taken exactly the same view. In the course of the argument counsel said (4), "In *Plant* v. *James* (5) the easement existed before the unity of possession," and Lord Justice *James* answered, "Can that make any difference?"—a question which implied an answer in the negative. And Lord Justice *Mellish* said, "I am not satisfied that if a man construct a paved road over one of his fields to his house, solely with a view to the convenient occupation of the house, a right to use that road would not pass if he sold the house separately from the field." And when he afterwards delivered the considered judgment of the Court of Appeal he said (6), "We may also observe that in *Langley* v. *Hammond* (7), Baron *Bramwell* expressed an opinion, in which we concur, that, even in the case of a right of way, if there was a formed road made over the alleged servient tenement, to and for the apparent use of the dominant tenement, a right of way over such road might pass by a conveyance of the dominant tenement with the ordinary general words." I adopt that view. I think that when there are two adjoining closes, and there exists over one of them a formed and constructed road, which is in fact used for the purposes of the other, and that other is granted with

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(1) 4th Ed. vol. iii. p. 51.

(2) 5 B. & A. 830, 834.

(3) Law Rep. 6 Eq. 36.

(4) Ibid. 3 Ex. 161.

(1) Law Rep. 10 Q. B. 360.
(2) Ibid. 6 Ch. 166.
(3) Ibid. 10 Q. B. 367.
(4) Law Rep. 6 Ch. 172.
(5) 5 B. & Ad. 791.
(6) Law Rep. 6 Ch. 174.
(7) Law Rep. 3 Ex. 161.

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the general words "together with all ways now used or enjoyed therewith," a right of way over the formed road will pass to the grantee, even though that road had been constructed during the unity of possession of the two closes, and had not existed previously. That being so, there can be no doubt that in the present case a right to use the gravelled path passed to the Plaintiff. Then arises the question whether the Plaintiff has ever abandoned her right? Abandonment is a question of intention. It depends, not solely on lapse of time, but on the true inference which is to be drawn by the Court from the facts. [His Lordship referred to the evidence on this point, and continued:—] I cannot find any intention on the part of the Plaintiff to abandon her right. I think she was justified in coming to the Court for the reformation of the deed, and that she is entitled to have it reformed so that it may give her, instead of an undivided moiety of the pink and blue land, the blue land in severalty, together with a right of way over the gravelled path for all purposes connected with the blue land. And, as it appears that the path has been destroyed by the Defendant, *William Grubb*, I order him to construct a path on the site of the path which existed at the date of the deed. He must pay the costs of all the parties to the action, including the costs of the Defendant *Malyon*.

Solicitors: *Ewbank & Partington*, agents for *R. A. Ward, Maidenhead; Venn & Woodcock.*

W. L. C.

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July 1, 2.

In re BARBER'S SETTLED ESTATES.

Estate pur autre Vie—Successive Limitations—Executory Devise—Power of Alienation—Leasehold for Lives—Tenant for Life and Remainderman—Overriding Trust for Renewal—Refusal of Reversioner to renew—Sale under Settled Estates Act—Application of Purchase-money.

When an estate *pur autre vie* is made the subject of successive limitations, the power of alienation of the successive takers is to be regulated, as far as possible, by analogy to the rules which govern similar limitations of an estate in fee simple.

Therefore an executory devise of an estate *pur autre vie* cannot be defeated by the prior taker of a *quasi* estate in fee simple.

[illegible](d3)72

Leaseholds for lives were devised on trust for *J.* in fee, but, if he should die without leaving issue living at his death, then on trust for *W.* in fee, and there was an overriding trust for renewal of the lease out of the rents. After the death of the testator the reversioner refused to renew the lease or to sell the reversion, and the lease was sold under the provisions of the *Settled Estates Act*:—

Held, that the purchase-money must be invested in ordinary securities, and the income only paid to *J.* for his life.

In re Wood's Estate (1), *Hollier* v. *Burne* (2), and *Maddy* v. *Hale* (3) followed.

PETITION under the *Settled Estates Act*, 1877.

John Barber, by his will, dated the 5th of March, 1829, gave and devised all his freehold, leasehold, and copyhold estates to trustees, their heirs, executors, administrators, and assigns, according to the tenure thereof respectively, to hold to the uses and upon the trusts therein declared. And he directed his trustees from time to time to let the said lands and other hereditaments and trust estates, and to receive and give discharges for the rents and profits thereof, and thereout to keep the leasehold and copyhold estates repaired and insured and renewed and full lived, so as for each estate to bear its own burden or share of those expenses. And the testator declared that his trustees should stand seised and possessed of the hereditaments thereby devised to them upon the following trusts, namely (*inter alia*), as to his farm called the *Old Court*, at *Bosbury*, in the county of *Hereford*, and the tithes and all other hereditaments belonging to him there as lessee of the Bishop of *Hereford*, upon trust for his two grandchildren, *John Barber* and *Samuel Good Barber*, their heirs and assigns, as tenants in common, but if they or either of them should die without leaving lawful issue living at his or their decease, then upon trust, as to the share or shares (as the case might happen) of either or both of them as should so die without such issue, for the testator's grandson, *William Barber*, his heirs and assigns. The testator died on the 8th of May, 1829. The hereditaments devised by the will upon trust for the three grandsons consisted partly of freeholds, partly of copyholds, and partly of hereditaments which were held upon leases granted by the Bishop of *Hereford* to the testator, his heirs and assigns, for the lives of three other persons and the life of the longest liver of them. One of the leases was renewed by the Bishop in July, 1851, upon payment of a fine of £3150 by the trustees. This sum was provided by the grandsons *John Barber* and *S. G. Barber*. They had borrowed £2600 of the amount upon an agreement to secure the same by an equitable charge upon the *Bosbury* property. In 1859 *S. G. Barber* died. He left no issue. Upon the dropping, in September, 1863, of one of the lives for which the leases had been granted, the Bishop refused to renew the leases or to sell the reversion. In May, 1865, an agreement was entered into for the sale to the Bishop, for the sum of £10,500, of all the *Bosbury* property, freehold, copyhold, and leasehold, and this agreement was sanctioned by the Court of Chancery under the provisions of the *Settled Estates Act*, and the agreement was afterwards carried out. The purchase-money was received and was invested by the trustees in various securities. The portion of the purchase-money attributable to the leasehold part of the property amounted to more than £7500.

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(1) Law Rep. 10 Eq. 572.

(2) Law Rep. 16 Eq. 163.

(3) 3 Ch. D. 327.

In 1880, in an action of *Barber* v. *Barber*, in which *John Barber* was Plaintiff and *William Barber* was Defendant, a declaration was made that the proceeds of the sale of the estate were charged with the £2600. The present petition was by *John Barber*, asking that the £2600 might be raised out of the securities on which the purchase-money was invested, for the purpose of paying off the equitable charge. The petition also asked that the rights of the

Petitioner and *William Barber* in the balance of the purchase-money might be ascertained and declared.

The Respondents were *William Barber* and the trustees of the will.

F. A. Lewin, for the Petitioner:—

William Barber is, no doubt, entitled, by reason of the death without issue of *S. G. Barber*, to half the fund which now represents the leasehold property, subject to the charge of £2600. But the Petitioner is absolutely entitled to the other half, and can dispose of it so as to defeat the executory devise over to *William Barber*. When there are successive limitations of an estate *pur autre vie* the whole estate is in the first taker, and every person who takes after him takes only as a special occupant. When the limitation is to a man and his heirs, the heir takes, not as heir, but as special occupant. The first taker can dispose of the estate so as to defeat the title of the special occupant. There can be a special occupancy of an equitable estate: *Reynolds* v. *Wright* (1). *William Barber's* interest is only that of a special occupant; there cannot be a *quasi* executory devise of an estate *pur autre vie*. *William Barber* stands in no better position than the issue of a *quasi* tenant in tail of an estate *pur autre vie*, or the remainderman after such a *quasi* estate tail. In such cases the *Statute de Donis* (13 Edw. 1, c. 1) does not apply, and the first taker can by deed or agreement bar his own issue and the remainderman: *Low* v. *Burron* (2); *Saltern* v. *Saltern* (3); *Doe* v. *Luxton* (4); *Fearne's* Contingent Remainders (5); *Lewin* on Trusts (6); *Tudor's* Leading Cases on Real Property (7); *Co. Litt.* (8).

[FRY, J., referred to *Dillon* v. *Dillon* (9) and *Allen* v. *Allen* (10), as shewing that the *quasi* tenant in tail of an estate *pur autre vie* cannot dispose of the whole estate by will.]

In *Doe* v. *Luxton* Lord *Kenyon* intimated an opinion that he could (11).

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(1) 2 D. F. & J. 590.
(2) 3 P. Wms. 262.
(3) 2 Atk. 376.
(4) 6 T. R. 289.
(5) 10th Ed. pp. 495 *et seq.*
(6) 7th Ed. p. 595.
(7) 3rd Ed. pp. 54–56.
(8) 20 a, 19th Ed. (Butler's note).
(9) 1 Ball & B. 77.
(10) 2 D. & War. 307.
(11) 6 T. R. 293.

A tenant for life of an estate *pur autre vie* is prevented from disposing of the whole estate by the very terms of the limitation; the donor has in fact expressed an intention that he shall not have power to alienate more than his own life estate. But, unless the donor has said that he shall not do so, the first taker can always defeat the special occupant who is to come after him. The exact point which now arises has never been actually decided. Mr. *Preston* only says (1): "If there be a limitation to one and his heirs, and not to the heirs of his body, with a limitation over by way of executory devise, or shifting use, this limitation cannot, it would seem, be barred by the first taker." This hardly amounts to the expression of an opinion. Nothing is said on the point in *Cruise's* Digest.

H. Fellows, for *William Barber,* was not heard.

R. W. Ingham, for the trustees.

FRY, J., after stating the facts, continued:—

The law as to estates *pur autre vie* is no doubt very anomalous and very singular. When an estate *pur autre vie* is given to a man, or to him and his heirs, the most he can take is an estate for his own life, and any one who comes in after him takes, not through him, but as occupant of the estate. Originally any one who pleased was allowed to scramble for the occupancy after the death of the first taker, but this was found to be so inconvenient that he was allowed to appoint by will a special occupant. But still every one who came in after the first taker came in as an occupant, and not as deriving title through him. Such a mode of devolution is very different from that of an estate in fee simple. But still, for the sake of convenience, the Legislature and the Courts have enforced an analogy between these estates *pur autre vie* and estates in fee simple, and have given effect to it with regard both to the capacity and the incapacity of alienation by the first taker. With regard to the power of disposition by the first taker, there is, no doubt, a material difference between an estate *pur autre vie* and an estate in fee simple, because the first taker of an estate *pur autre vie* has the whole estate in him, and it might have been supposed that he could dispose of the whole. But nevertheless his power of disposition has been limited. By what? By the regard paid to the intention expressed by the settlor or donor that a particular person shall be the special occupant after the first taker. For that reason, and for that reason only I think, a limitation has been put upon the first taker's power of appointing a special occupant. The analogy to which I have referred was enforced by sect. 12 of the *Statute of Frauds*, which made an estate *pur autre vie* devisable, but provided that the heir of the first taker, if he took the estate as special occupant, should hold it as assets for the payment of his ancestor's debts, though, of course, it was not strictly assets for that purpose. In the same way a series of decisions of the Courts have permitted the creation of successive limitations of an estate *pur autre vie*—*quasi* estates for life, *quasi* estates in tail, *quasi* estates in fee in remainder, and *quasi* executory devises over. They have permitted alienation by deed by the *quasi* tenant in tail in possession, and they have gone further, and have allowed alienation by deed by the *quasi* tenant in tail in remainder, with the concurrence of the *quasi* tenant for life in possession, though, of course, the *quasi* tenant in tail in remainder has in truth no estate. But the Courts have declined to allow alienation by the *quasi* tenant in tail in remainder without the concurrence of the *quasi* tenant for life in possession, at any rate so as to bar the remainder expectant on the estate tail, though probably such an alienation might be held to create a *quasi* base fee. They have disallowed dispositions by will by the *quasi* tenant in tail in possession and by the *quasi* tenant for life in possession, though, of course, both the *quasi* tenant in tail in possession and the *quasi* tenant for life in possession were in one sense absolutely entitled to the whole interest in the property; and yet the designation of the person who was to take afterwards as special occupant has been held sufficient to put a restraint on the first taker's power of disposition. Lord *St. Leonards*, in *Allen* v. *Allen* (1), proceeded upon this analogy between estates *pur autre vie* and estates in fee simple, and said (2) that "the analogy with fee simple estates

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(1) Preston on Abstracts, 2nd Ed. vol. i. p. 438.

(1) 2 D. & W. 307.

(2) 2 D. & War. 327.

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ought to be supported as far as it can be." In the present case I shall apply that analogy. I ask, therefore, if, instead of the disposition being of an estate *pur autre vie,* it had been a disposition of an estate in fee simple, could *John Barber* have defeated the executory devise over in favour of *William Barber?* It was fairly admitted by Mr. *Lewin* that he could not. Consequently, by analogy, he cannot in the present case defeat *William Barber's* interest in the estate. Mr. *Preston,* in a passage which has been cited (1), has expressed an opinion to the same effect, but of course that is only the opinion of a learned text-writer. The principle on which I decide the case is this, that the analogy of a fee simple estate is to be applied, so far as it can be applied, both as to the capacity and the incapacity of alienation of an estate *pur autre vie.* The result is that *John Barber* cannot defeat the interest given to *William Barber.*

Lewin, for the Petitioner :—

The next question is how the purchase-money is to be apportioned.

The £2600 ought to be paid out of it in the first instance. The effect of the direction in the will to pay the fines for renewal out of the rents (not the annual rents), is to charge the fines on the *corpus* of the estate: *Allan* v. *Backhouse* (2); *Ivy* v. *Gilbert* (3).

[*Fellows* :—I do not dispute that.]

Then so much of the balance as represents the value of the leasehold ought to be invested in the purchase of an annuity to run for the period of the lives for which the lease was granted, and a moiety of the annuity should be paid to the Petitioner for his life, or so long as it continues payable. The case is distinguishable from *In re Wood's Estate* (4), *Hollier* v. *Burne* (5), and *Maddy* v. *Hale* (6). In those cases it was held that the tenant for life ought to receive only the income of a fund which represented the value of a renewable leasehold, the fund being invested in ordinary securities. But in all of them there was an over-

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(1) Preston on Abstracts, 2nd Ed. vol. i. p. 438.

(2) 2 V. & B. 65.

(3) Prec. in Ch. 583; 2 P. Wms. 13.

(4) Law Rep. 10 Eq. 572.

(5) Ibid. 16 Eq. 163.

(6) 3 Ch. D. 327.

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riding trust for the perpetual renewal of the lease for the benefit of all the beneficiaries. In the present case there is not such a trust, and the cases of *Morres* v. *Hodges* (1), *Richardson* v. *Moore* (2), and *Tardiff* v. *Robinson* (3) apply. The trust or charge for renewal having failed, the persons entitled to the property take it as if that trust or charge had never existed. They ought to be placed in their original position, and their rights cannot be altered by the conversion into money: *Askew* v. *Woodhead* (4). It would be very hard on the Petitioner that his income should be diminished.

[FRY, J.:—If you are right, the remainderman alone will suffer.]

On the other construction, the whole loss will be borne by the Petitioner.

Fellows, for *W. Barber.*

I do not dispute the decision in *Allan* v. *Backhouse* (5).

[FRY, J.:—I do not wish to hear you as to the application of the balance.]

FRY, J.:—

It is conceded, and I think rightly, that the £2600 which was charged on the estate for part of the sum paid for the last renewal of the leaseholds must come out of so much of the purchase-money as represents the leaseholds. There remains the question how the balance of that part of the purchase-money which is attributable to the leaseholds is to be dealt with. Mr. *Lewin* argues that it ought to be invested in the purchase of an annuity to run for the same period as the lives which were in existence at the time when the sale was made by the direction of the Court under the Act, and that the annuity should be paid to *John Barber* during his life. Mr. *Fellows* contends that the money ought to be invested in ordinary securities, the income only of which should be paid to the first taker. It appears to me plain that the primary intention of the testator was to create a perpetuity by means of the continual renewal of the leaseholds; he desired to create an estate which should go to the heirs of the persons whom he intended to benefit. The Bishop has declined to renew the leases or to sell the reversions, and therefore the intention of the testator has been frustrated. The leaseholds have been sold as such, and the question is how the purchase-money is to be dealt with.

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(1) 27 Beav. 625.
(2) Ibid. 629, n.
(3) 27 Beav. 630, n.
(4) 14 Ch. D. 27.
(5) 2 V. & B. 65.

The case of *In re Wood's Estate* (1) seems to me to indicate the principle on which I ought to proceed. The decision there went upon the ground that, where there is an overriding trust for the purpose of creating a perpetuity, and by the action of a third person (in that case it was a railway company who purchased the land) it is converted into a perpetuity of another description—viz., money—the Court will leave it in the condition of money invested, and will thus create another property of a perpetual character, which will take the place of the original property of a perpetual character. In that case Vice-Chancellor *James* said (2), "The result, in my opinion, of the purchase by the railway company is, that one property in perpetuity is substituted for another property in perpetuity; and that, as between the tenant for life and the remainderman, I cannot take away any part of the *corpus* belonging to the latter in order to make good the diminished income of the former." A similar question came before the present Lord Chancellor, when sitting for the Master of the Rolls, in *Hollier* v. *Burne* (3). It is not material for me to refer to the particular circumstances of that case, but the general principle was enunciated by the Lord Chancellor thus (4): "Assuming that the best bargain which can be obtained is made with the Commissioners, upon terms which it would be wise and beneficial to accept, if the interests were not divided between a tenant for life and remainderman, the question remains whether the Court can interpose its authority to carry through such an arrangement without injustice to the tenant for life. It is not immaterial to remember that, by the general law of the Court, if a perishable or

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(1) Law Rep. 10 Eq. 572.

(2) Ibid. 584.

(3) Law Rep. 16 Eq. 163.

(4) Ibid. 166.

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terminable estate, such as a lease or an annuity not perpetual, is settled by will upon a tenant for life, with remainders over, the tenant for life is not entitled to enjoy this kind of property in specie without an express direction for that purpose; it must, in the absence of such a direction, be converted into money, in order that the *corpus* of the same subject, of which the tenant for life is entitled to receive the income, may pass unimpaired, upon the cessation of the life interest, to the remaindermen. When a testator by his will contemplates and provides for the perpetual continuance of church leaseholds settled upon a tenant for life with remainders over, by a series of renewals, his purpose evidently is, not that the tenant for life should receive any benefit at the expense of the remaindermen, but that the remaindermen should succeed in due course to the enjoyment of the same property of which the tenant for life is entitled to the income. If the trust for the renewal is absolute and overrides his interest, the tenant for life is not entitled to object, on the ground of the reduction of his income, to any arrangement in lieu of renewal which may be made under the provisions of the Act of Parliament, when renewal ceases to be possible, so long as the best practicable terms are obtained. The property purchased from the Commissioners at the price agreed upon represents, under these circumstances, the permanent or capitalized value of the trust property, for the purpose of that succession of interests which the testator intended."

In that case the conversion was effected, not by the action of a third person, as in *In re Wood's Estate* (1), but by force of the powers contained in sect. 37 of the Act 23 & 24 Vict. c. 124, of which the trustees availed themselves. Still, the renewal of the lease having ceased to be possible, and the best possible terms having been made with the reversioner for the purchase of the reversion, the result was the creation of another property instead of the original one, and the Court favoured the arrangement and directed it to be carried into effect.

Lastly, in *Maddy* v. *Hale* (2), the Court of Appeal came to the conclusion that there was a "predominant trust for renewal overriding the dispositions in favour of the successive beneficiaries," and Lord Justice *Baggallay*, who delivered the judgment of the Court, said (1): "The decisions in *In re Wood's Estate* (2) and *Hollier* v. *Burne* (3) would indicate that the strictly correct course to have followed would have been for the trustees to have exercised their power of sale over the leaseholds as soon as it was ascertained that the leaseholds could not be again renewed, a period corresponding in the present case with that of the last renewal, viz., in 1866; and, had the power been so exercised, the beneficiaries during the life of the widow would have been entitled to the income arising from the investment of the amount so produced." The course there indicated by the Lord Justice is that which has been actually pursued in the present case, with one exception, that he there referred to the exercise of a particular power of sale, whereas here the sale has been effected under the general power conferred by the *Settled Estates Act.* Can that make any difference? In my judgment it cannot. In *Hollier* v. *Burne* the trustees exercised the statutory power of buying the reversion, and thus converted the renewable leaseholds into a perpetuity, and the Court approved of the arrangement, because it preserved the property for the successive beneficiaries according to the testator's intention. In the present case, the exercise of a statutory power of sale has converted the leasehold which the testator expected to be renewable for ever into a money fund; and that fund, I think, may be made perpetual. No doubt the tenant for life will suffer a serious loss of income, but so he would have done if the refusal to renew had resulted in the termination of the lease during his life, and in that case the tenant in remainder would have lost everything. In fact the refusal of the Bishop to sell or to renew has converted the renewable interest into one which is not renewable. This is an accident which has resulted from the act of a third person; neither the tenant for life nor the tenant in remainder is in any way responsible for it. I think, therefore, that the principle of *In re Wood's Estate, Hollier* v. *Burne*, and *Maddy* v. *Hale* (4) applies. The £2600 must be paid out of the purchase-money. A moiety of the balance must be paid

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(1) Law Rep. 10 Eq. 572.

(2) 3 Ch. D. 327.

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(1) 3 Ch. D. 340.

(2) Law Rep. 10 Eq. 572.

(3) Law Rep. 16 Eq. 163.

(4) 3 Ch. D. 327.

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to *William Barber*, and the other moiety must be invested in ordinary securities, the income of which will be paid to the Petitioner during his life.

Solicitors for Petitioner: *Janson, Cobb, & Pearson*, agents for *W. P. Hughes, Worcester.*

Solicitors for *W. Barber*: *Hunt & Son*, agents for *T. G. Hyde, Worcester.*

Solicitors for Trustees: *Church, Sons, & Clarke*, agents for *Thomas Southall, Worcester.*

W. L. C.

FRY, J.
1881
July 25.

In re WILKINS.
SPENCER *v.* DUCKWORTH.

[1880 W. 0697.]

Will—Construction—Legacy—Vesting—Gift over in case Legatee should die before "final division" of Estate.

A testator gave the residue of his estate equally between four persons, and gave the shares over to the children of the legatees in case the legatees respectively should die before the "final division" of his estate. Two of the legatees died more than a year after the death of the testator. The estate had not then been fully realized and distributed.

Held, that the "final division" of the estate meant the period of a year from the death of the testator, and that the shares of the deceased legatees had not gone over.

Johnson v. *Crook* (1) approved.

FURTHER CONSIDERATION.

This action was brought for the administration of the real and personal estate of *Thomas Wilkins*, who died on the 15th of January, 1879. The writ was issued on the 20th of May, 1880. The testator, by his will, dated the 14th of May, 1878, gave the proceeds of sale of certain real estate and his residuary personal estate (after the payment of certain legacies) to the Defendants (whom he also appointed his executors), upon trust to pay thereout his debts and funeral and testamentary expenses, and then to divide all the remaining trust moneys into four equal

(1) 12 Ch. D. 639.

parts, and to pay one-fourth part or share to each of *Robert Wilkins, T. G. Wilkins,* and *George Wilkins,* to whom the testator bequeathed the same "for each his own use absolutely," and to pay the remaining one-fourth part or share to *Mary Ann Spencer*, the wife of *George Spencer*, one of the Defendants, to whom the testator bequeathed the same for her own use absolutely. Then came the following clause:—" And I declare that, if either of them my four legatees shall die before the final division of my estate, then I bequeath the share of such trust moneys intended for him or her so having died unto his or her children or child, if more than one in equal shares, for their own use absolutely; if only one child, then such only child to take the parent's share for his or her own use absolutely."

The Plaintiffs in the action were *Mary Ann Spencer* by a next friend, and *Robert Wilkins.*

At the trial before Vice-Chancellor *Malins* on the 11th of June, 1880, judgment was given for the administration of the estate, and (*inter alia*) an inquiry was directed whether the four residuary legatees, or any and which of them, had died before the final division of the testator's estate, and if so, whether the legatee or legatees so dying had had any and, if any, what child or children.

By his certificate filed the 3rd of June, 1881, the Chief Clerk found that the legacies bequeathed by the testator's will (other than the residuary legacies) had been paid, retained, or otherwise satisfied, and that there was certain personal estate of the testator still outstanding. And he found that *Mary Ann Spencer* died on the 23rd of December, 1880, and that she had had five children, all of whom were living; that *Robert Wilkins* was living; that *T. G. Wilkins* died on the 1st of April, 1880, and that he had had ten children, of whom one was dead; and that *George Wilkins* was still living. The question was whether *Mary Ann Spencer* and *T. G. Wilkins* had died before the "final division" of the testator's estate, and whether their shares of the residue of the estate had gone over to their children respectively.

S. Dickinson, for *Robert Wilkins*, and for the personal representative of *Mary Ann Spencer*:—

By the "final division" of the estate is meant the period of a

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year from the testator's death: *Collison* v. *Barber* (1); *Chaston* v. *Seago* (2). *Johnson* v. *Crook* (3) is distinguishable.

[FRY, J., referred to *Bubb* v. *Padwick* (4) and *In re Arrowsmith's Trusts* (5).]

Farwell, for the executors of *T. G. Wilkins*, contended for the same construction, referring to *Chaston* v. *Seago* and *Collison* v. *Barber*. If the words "final division" mean the time when the fund has been actually finally distributed, then if one legatee had received his share and had then died before the others had received theirs, his share must be refunded. This would be absurd.

O. L. Clare, for the children of *T. G. Wilkins*:—

The words "final division" must be construed literally, and therefore the gift over of the share of *T. G. Wilkins* to his children has taken effect. There is no difficulty in ascertaining the period of final division, and a gift over in case of death before that period in its literal sense is valid: *Johnson* v. *Crook*. In that case *Jessel*, M.R., expressed his disapproval of *Martin* v. *Martin* (6). The gift over applies only to that part of the fund which at the time when the death takes place is in the hands of the trustees; if a legatee had received his share before he died, there would have been a final division so far as he was concerned, even though the other legatees had not received theirs. *In re Arrowsmith's Trusts* and *Collison* v. *Barber* do not apply.

[He referred also to *Hutchin* v. *Mannington* (7); *Minors* v. *Battison* (8); *Bubb* v. *Padwick*; *Roberts* v. *Youle* (9).]

C. Archer Cook, for the Defendants and for the children of *Mary Ann Spencer*.

FRY, J., after stating the facts, continued:—

The question which I have to decide is, what is the meaning of

(1) 12 Ch. D. 834.
(2) *Ante*, p. 218.
(3) 12 Ch. D. 639.
(4) 13 Ch. D. 517.
(5) 29 L. J. (Ch.) 774; 2 D. F. & J. 474.
(6) Law Rep. 2 Eq. 404.
(7) 1 Ves. 366.
(8) 1 App. Cas. 428.
(9) 49 L. J. (Ch.) 744.

(5) S.C. 6 Jur. N.S. 1231; 7 ib. 9

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the words "final division of my estate" in the gift over of the four legatees' respective shares? In other words, what is the event or period before such death of the donee which will make the gift over take effect? It appears to me that there are only two possible periods to which the words can relate. The first is the end of the period which the law allows for the distribution of the estates of deceased persons, that is, twelve months from the death of the testator; the other is the period when the last farthing of assets has been got in and actually divided. If the latter view is to be adopted, it is obvious that the utmost inconvenience would result, for nothing could safely be distributed until after every farthing of assets had been got in, however remote and however inconsiderable, for otherwise the share of a legatee who had received his share, but who had died before the others had received their shares, would have to be refunded by his representatives. No division could be made until a total and contemporaneous division of the whole estate could be made. Convenience, therefore, points to the construction that the period of twelve months from the testator's death, when the estate ought to be distributed, ought to be taken as the period of "final division" of the estate. On the supposition that the testator was influenced by the motives which ordinarily actuate mankind, I think that I am bound to conclude that he had this period in his mind, because no inconvenience would on that interpretation result from the terms of his will. In giving this interpretation to the language, I think I am supported by the decisions in the reported cases. The case of *In re Arrowsmith's Trusts* (1) was very similar to that now before me, and there Vice-Chancellor *Kindersley* said (2): "I think I must hold that, in this case, the time to which the testator must be taken to have referred, when he used the words 'die before receiving their shares,' was the termination of the period which the law usually allows to executors for the payment of legatees, that is, the period of twelve months from the testator's decease." He had previously said (3): "If the widow had been entitled to a life interest in the fund, beyond all doubt her death would have been the moment of

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(1) 29 L. J. (Ch.) 774. 6 Jur NS 1231.
(2) 29 L. J. (Ch.) 778. 6 Jur N S 1232
(3) 29 L. J. (Ch.) 777. 6 Jur NS. 1232

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payment. But, as I am of opinion that she had no such interest, we must look for some other time. Now the law, or at all events the practice of this Court, allows executors twelve months from the death of their testator within which to wind up his affairs, to pay his debts, and satisfy his legacies; in short, to clear his estate. That is the period which the law considers executors entitled to exhaust before a legatee can, in ordinary cases, reasonably and fairly expect to obtain payment of his legacy, and within which period, therefore, in such cases, a legatee cannot complain if he is not paid." The observations of the learned Lords who considered the case of *Minors* v. *Battison* (1) tend, I think, in the same direction. The present Lord Chancellor (Lord *Selborne*) there said (2) that "it was decided in *Hutchin* v. *Mannington* (3) and *Martin* v. *Martin* (4) that such a divesting clause, if it refers to the time of actual receipt, is too uncertain and indefinite to be capable of being carried into effect." That shews that in the Lord Chancellor's opinion the same principle is especially applicable to a case where the words used by the testator are "final division" of my estate. The present Master of the Rolls held, no doubt, in *Johnson* v. *Crook* (5), that a gift over in case of death before the time of actual receipt of a legacy is not void for uncertainty. My present decision does not in any way conflict with that, and in the recent case of *Chaston* v. *Seago* (6) I intended to express my entire concurrence in the view of the Master of the Rolls. The question there considered was whether the contingency referred to could or could not be ascertained. The question here is different; it is what is the reasonable construction of the words "final division of my estate." The argument of Mr. *Clare* that the clause might operate from time to time is very ingenious, but it is not, in my opinion, warranted by the words of the testator, for he gives over the entirety of the interest of the legatee who dies before the final division. I therefore hold that, the two deceased legatees having survived the period of twelve months from the testator's death, their legal personal representatives are entitled to their respective shares, and that the gifts over to their children have not taken effect.

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(1) 1 App. Cas. 428.
(2) Ibid. 452.
(3) 1 Ves. 366.
(4) Law Rep. 2 Eq. 404.
(5) 12 Ch. D. 639.
(6) *Ante*, p. 218.

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Solicitors: *Lambert, Petch, & Shakespear,* agents for *T. White, Ryde; Pritchard, Englefield, & Co.*

W. L. C.

In re ALBION LIFE ASSURANCE SOCIETY.

BROWN'S CASE.

FRY, J.
1881
Aug. 2.

Company—Assurance Society—Contributory—Participating Policy-holders—Assignment of Policy.

It having been held in *In re Albion Life Assurance Society* (1) that assurance members, being participating policy-holders of the *Albion Society*, were contributories in the winding-up of the company:—

Held, that a policy-holder who had assigned his policy ceased to be liable as a contributory, although no other person had been made liable to contribute in respect of his policy in his stead.

THIS was an adjourned summons for the purpose of settling the position of policy-holders in the *Albion Life Assurance Society* who had assigned their policies to others.

It was decided in *In re Albion Life Assurance Society* (1) that participating policy-holders were members and contributories under the special terms of the articles of association, and the question in this case was whether a participating policy-holder who had assigned his policy under the following circumstances was a contributory.

On the 8th of October, 1866, a proposal for a policy for £400 was forwarded by the Rev. *Wilson Brown* to the assurance society, at the foot of which were the words "And I further agree to execute the articles of association or any deed of covenant in conformity thereto when required."

The proposal was duly accepted by the society and the policy effected, and the last clause of the policy was as follows: "Provided, nevertheless, that this policy and the assurance hereby made, shall be subject and liable to the several terms and conditions printed on the back hereof, and to the said articles of

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(1) 16 Ch. D. 83.

FRY, J.
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association, rules, and regulations of the said society, so far as the same can be applicable."

By an indenture dated the 14th of May, 1867, and made between the Rev. *W. Brown* of the one part, and *Elias Vooght* of the other part, Mr. *Brown* assigned the policy to *Elias Vooght* to secure the repayment of a loan, and two sureties, *Sedgwick* and *Woollcombe,* entered into a bond by way of further security for the loan.

The Rev. *W. Brown* became bankrupt. The sureties on the bond afterwards repaid *Vooght* the amount due to him, and by an indenture of the 24th of February, 1874, and made between *E. Vooght* of the one part, and *Woollcombe* and *Sedgwick* of the other part, *Vooght* assigned the policy to *Woollcombe* and *Sedgwick.* Notice of the assignment was given to the society, and the premiums on the policy were paid by *Woollcombe* and *Sedgwick* down to the 18th of December, 1877, when the society was ordered to be wound up; but neither they nor any other person were ever substituted for the Rev. *W. Brown* on the register of members or holders of the policy.

The Rev. *W. Brown* received from the official liquidator of the society a notice that he was included in the list in respect of his policy.

On the 22nd of April, 1880, a summons was taken out by the official liquidator for a call on the assurance members as contributories, and the summons was served on Mr. *Brown* as one of the contributories, and on the 29th of June, 1881, an order was made in the terms of the summons.

On the 27th of June, 1881 the present summons was taken out by Mr. *Brown,* and by it he asked that the Chief Clerk's certificate of the result of the settlement of the list of contributories might be altered or varied by excluding the name of the applicant from the schedule to such certificate.

The interpretation clause in the articles of association of the company was as follows:—

"'Assurance member' means every person for the time being holding a subsisting policy of assurance with the company for the whole term of life on the terms of participating in the profits of the company and duly registered as a member of the company."

The 2nd and 13th clauses of the articles of association, referred to in the judgment, are set out in the report of *In re Albion Life Assurance Society* (1), and the following clauses were also referred to, viz.:—

Clause 52, by which an extraordinary general meeting was to be called by the board on the requisition of any members of the company, not less than five in number, holding in the aggregate not less than 500 shares or assurances in the company to the amount of £5000, or not less than 250 shares.

Clause 91, by which the qualification of a director was to be his holding in his own right fifty shares, or an assurance with the company for the whole term of life, in the sum of £1000 or upwards, either on his own life or the life of another person, in which he should have an interest, or partly on his own life and partly on the life of another such person.

Clause 147, by which, if any premiums upon any policy issued or undertaken by the company should be unpaid for thirty days, if the premiums be payable yearly, or for such time not exceeding thirty days as the directors should appoint, if the premiums be payable at periods less than a year, every such policy, and all payments heretofore made, and all claims on the company in respect thereof, were to be absolutely forfeited.

Clause 153, which provided that no person should be entitled to be registered as a member of the company in respect of any policy until he should (if required by the directors so to do) have signed an agreement to become a member of the company. The payment of a premium on a policy which would entitle the holder, if registered, to be an assurance member, should be deemed to be an agreement to become a member in respect thereof.

Clause 154, which provided that no person becoming by transfer, assignment, or transmission, the holder of a policy which would entitle him, if registered, to be an assurance member of the company, should be entitled to be registered as a member of the company until he should have furnished to the directors such evidence as they should require of the transfer, assignment, or transmission of such policy to him.

Clause 155, which provided that "Any person becoming entitled

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(1) 16 Ch. D. 83.

FRY, J.
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Brown's Case.

to a policy (in respect of which the former holder was an assurance member) as the executor or administrator of such assurance member, or in consequence of the bankruptcy or insolvency of such insurance member, or the marriage of such assurance member if a female, might, upon producing such evidence as the directors should think sufficient, either be registered himself as a member of the company in respect of such policy, or elect to have some person nominated by him and approved by the directors, registered as a member in respect thereof. Provided, nevertheless, that if he should elect to have his nominee so registered, he should testify such election by executing a proper assignment of the policy to such nominee."

North, Q.C., and *Vernon R. Smith*, for the summons:—

This case depends solely on the articles of association: *Winstone's Case* (1). There it was decided that liability as an assurance member of the society did not depend on registration in the books of the society.

By the 13th clause, after a person has assigned away his participating policy he can derive no benefit from it, and if he were held to be liable on it after the assignment, he would have an unlimited liability without any corresponding advantage. Under the Companies Acts assignment relieves from liability.

When *Brown* became insolvent he was relieved from liability by clause 115, which provides for the transfer of the policy on bankruptcy, and the substitution of the new holder in the place of the old one.

Sect. 31 of the *Bankruptcy Act*, 1869, shews that the liquidator could have proved against the bankrupt's estate: *Lindley* on Partnership (2); *Macfarlane's Claim* (3). Much more difficult claims than this, such as claims to an annuity during widowhood, have been capable of proof in bankruptcy. *Hastie's Case* (4), and other cases in which it has been held that one person could not get off the register without bringing some one else on it, have been decided on the language of the articles, or on Table A, but here Table A does not apply. *Brown's* contention is, not that

(1) 12 Ch. D. 239.
(2) 4th Ed. vol. ii. p. 1180.
(3) 17 Ch. D. 337.
(4) Law Rep. 4 Ch. 274.

he is relieved from liability because of his having transferred his shares, but because, by the terms of his contract, his liability has come to an end.

The delay of *Brown* in applying to be removed is not material under the circumstances: *Shewell's Case* (1).

Glasse, Q.C., and *Broome*, for the official liquidator:—

This claim could not be proved in bankruptcy: *Buckley* (2); *Fordoonjee's Case* (3). There, as here, the insolvency was before the winding-up. *Brown* cannot be relieved until some assignee has assumed, not only the benefits which the assignor enjoyed, but also the liabilities to which he was subject: *Curtis' Case* (4).

Fry, J.:—

The question which I have to decide in this case arises on the construction of the articles of association of this assurance society, because the policy-holder whose case is now before me has adopted and made himself liable on those articles. Does a policy-holder in this society, who assigns his interest in his policy and parts with his right to hold it, cease to be liable as a member of the society? In the first place, the interpretation clause defines an "assurance member" as being a "person for the time being holding a subsisting policy of assurance with the company for the whole term of life on the terms of participating in the profits of the company, and duly registered as a member of the company." That definition is very plain, and declares that an assurance member is a person who for the time being holds a policy; so that while he holds it he is a member, when he does not hold it he is not a member. The second clause of the articles of association makes two classes of members—the first consisting of shareholders, and the second consisting of assurance members for the time being. Then in clause 13 I find a provision that the net profits shall be appropriated as follows, viz.: "one-fourth part thereof among the shareholders (if any), and three-fourth parts, or the whole (if the subscription capital shall have been paid off) by way of bonus among the holders of such policies issued or undertaken by the

(1) Law Rep. 2 Ch. 387.
(2) 3rd Ed. p. 159.
(3) 3 Ch. D. 264.
(4) Law Rep. 6 Eq. 455.

company on the terms of participating in profits as shall be subsisting at the period fixed for each periodical account, and on which at least five years' premiums shall be paid in full." Now, it follows that if persons who have taken policies were to remain members, notwithstanding the assignment of their policies, the assignee would take the bonus while the assignor would retain the liability. Passing on from this I find a series of articles following which shew the mode of paying the bonuses and make it clear that the bonus goes to the holder of the policy. Clause 52 relates to extraordinary general meetings, and provides for such meetings being called on requisition of not less than five members of the company holding a certain quantity of shares and assurances in the company. From this clause it follows that if an assignor of a policy remained a member he would be unable to take part in calling a general meeting, which seems an improbable result. By clause 91 the qualification of a director consists of his holding a certain number of shares or a certain assurance with the company. There, again, if a person who took out a policy with the company and then assigned it were still to remain a member, he would be disqualified to be a director. In clause 147 I find provision made for forfeiture of policies, and it is plainly opposed to ordinary common sense to suppose that a person who has forfeited his policy can remain a member of the company; but yet, if forfeiture extinguishes his liability as a member, it is difficult to see why assignment should not have the same effect. Lastly, articles 153, 154, and 155 contain provisions enabling persons who have become holders of policies to become members of the company. It is not said that mere assignment makes the assignees members, but that it places them in a position to become such. These sections to which I have referred are all consistent with the definition clause, and shew that the whole scheme of the articles is this, that the holder of a policy is to be a member of the company, but that when he ceases to be the holder he is also to cease to be a member. Moreover, I find that Lord Justice *James*, when the articles were before him in *In re Albion Life Assurance Society* (1), explained the articles consistently with this construction, saying that the clause making participating policy-holders members was "only to give

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(1) 16 Ch. D. 83, 91.

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BROWN'S CASE.

them control over the funds which would be applicable for their policies, and that those provisions did not seem to him sufficient to imply that the mutual liabilities were different from those in ordinary offices." It is clear that these remarks apply to persons who are interested, and not to persons who were once interested but are so no longer. I hold, therefore, that Mr. *Brown*, having by the assignment of his policy and by the notice of such assignment, which was entered in the society's books on the 11th of July, 1867, ceased to be the holder of his policy, ceased also thereby to be a member of the society. Then the liquidator says that Mr. *Brown* cannot be relieved until some other person is registered in his place, and *Curtis' Case* (1) was cited to me. But that case did not depend upon the construction of such a special contract as there is in this case, and is no authority here. The question here is simply this—What is the contract between the parties? If the contract is on this footing, that the simply ceasing to hold the policy relieves the policy-holder from his liability, I must give effect to the contract. In *Curtis' Case* there was a provision of a different kind. The result is that I must make an order varying the Chief Clerk's certificate by relieving Mr. *Brown* from his liability as a member of the society.

Solicitor for Mr. *Brown*: *W. Moon.*
Solicitor for the Official Liquidator: *G. Blagden.*

(1) Law Rep. 6 Eq 455.

C. W. C.

FRY, J.
1881
July 22;
Aug. 3.

Ex parte VICAR OF ST. MARY, WIGTON.

Cash under Control of Court—Investment—23 & 24 *Vict.* c. 38, *s.* 10—*General Order of Court of Chancery*, 1*st February*, 1861, *r.* 1—*Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *s.* 70.

20 ChD. 206
22 ChD 94

Money paid into Court under the *Lands Clauses Act*, 1845, or under any other Act which directs money so paid in to be invested in specified securities, is not "cash under the control of the Court," within the meaning of the Act 23 & 24 Vict. c. 38, s. 10, and the General Order of the 1st of February, 1861, r. 1, and the Court cannot order such money to be invested in any securities but those which are specified in the Act under which it is paid in.

In re Boyd's Settled Estate (1) followed.

THIS was a petition by the vicar of *St. Mary, Wigton*, for the re-investment of the sum of £1120 18*s.* 7*d.*, which had been paid into Court by the corporation of *Carlisle*, being the sum awarded by an arbitrator as the purchase-money of certain lands belonging to the vicarage which had been compulsorily taken by the corporation, as the urban sanitary authority of the city of *Carlisle*, under a provisional order of the Local Government Board, dated the 2nd of March, 1876, and the *Local Government Board Provisional Orders Confirmation* (*Arundel, &c.*), *Act*, 1876. The effect of the provisional order, which was confirmed by the Act, was to empower the corporation to put in force the powers of the *Lands Clauses Consolidation Acts*, 1845, 1860, and 1869, with respect to the purchase and taking of lands otherwise than by agreement. The land was afterwards conveyed by the Petitioner to the corporation.

The Petitioner asked that the money might be invested in *India* 4 per cent. stock, and the dividends thereon paid to the Petitioner from time to time, so long as he should continue vicar, and to his successors, the vicars of the vicarage, for the time being.

Speed, for the Petitioner :—

The decisions are conflicting on the question whether the power

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(1) 21 W. R. 667. WN (1873) 113.

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of investment given by the General Order of the 1st of February, 1861, extends to money paid into Court under the *Lands Clauses Act*, or under other Acts which prescribe a specific mode of investment. In many cases such an investment as we ask has been ordered: *In re Cook's Settled Estates* (1); *In re Taddy's Settled Estates* (2); *In re Foy's Trusts* (3); *In re Fryer's Settlement* (4); *In re Southwold Railway* (5). However, in *In re Boyd's Settled Estate* (6), Lord *Selborne*, then Lord Chancellor, but sitting for Lord *Romilly*, M.R., held that money paid into Court under the *Leases and Sales of Settled Estates Act* was not cash under the control of the Court within the meaning of the Act 23 & 24 Vict. c. 38, s. 10, and that it could be invested only in the securities mentioned in the former Act. In *Langmead* v. *Cockerton* (7), *Jessel*, M.R., said that Lord *Selborne* decided *In re Boyd's Settled Estate* by virtue of his own original jurisdiction, as Lord Chancellor, to try cases in the first instance, and that his decision was, therefore, the decision of a Lord Chancellor, and as such binding upon every Judge of first instance. The Master of the Rolls, therefore, held that he was bound by the decision. But *Malins*, V.C., had previously, in *In re Taddy's Settled Estates*, declined to follow *In re Boyd's Settled Estate*, expressing an opinion that he was bound to regard the Lord Chancellor when sitting for the Master of the Rolls only as a Judge of first instance. And in *In re Fryer's Settlement* and in *In re Foy's Trusts*, *Hall*, V.C., did not follow *In re Boyd's Settled Estate*.

H. Sutton, for the Corporation.

FRY, J.:—

I will look at the authorities before giving my decision.

Aug. 3. FRY, J.:—

The question is whether moneys which are in Court or under the direction of the Court under a statute which provides that they shall be invested in a particular class of securities, are "cash under the control of the Court" within the meaning of *Lord St. Leonards' Act* and the General Order of the 1st of February, 1861? The question has been raised in numerous cases, with reference to different Acts—with regard to funds paid into Court under the old *Leases and Sales of Settled Estates Act* of 1856, the *Lands Clauses Consolidation Act*, the *Parliamentary Deposit Act* (9 & 10 Vict. c. 20) and some private Acts—and there has been the greatest conflict of judicial opinion upon it. Different Judges have taken different views, and indeed the same Judges have acted differently at different times. But I find that the question came before the present Lord Chancellor, who was then Lord Chancellor, though he was trying the cases set down before the Master of the Rolls, in *In re Boyd's Settled Estate* (1), and he decided that the power of investment conferred by *Lord St. Leonards' Act* does not apply to funds which, by the special Act under which they are paid into Court, are directed to be invested in a particular way. I think I am bound by that decision. I am quite aware that Vice-Chancellor *Malins* has expressed an opinion that it was to be treated as only the decision of a Court of co-ordinate jurisdiction, and that it was not binding on him. But the present Master of the Rolls has taken an opposite view, and I agree with him. I think the Lord Chancellor, wherever he is sitting and whatever cases he is trying, is still Lord Chancellor, and that his decision is binding on me. I shall, therefore, follow *In re Boyd's Settled Estate*, and shall refuse the application for investment in *India* 4 per cent. stock. I should be very glad if the question were taken before the Court of Appeal, for there is really a serious conflict in the decisions.

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(1) Law Rep. 12 Eq. 12.
(2) Ibid. 16 Eq. 532.
(3) 23 W. R. 744. WN (1875) 150
(4) Law Rep. 20 Eq. 468.
(5) 1 Ch. D. 697.
(6) 21 W. R. 667. WN (1873) 113
(7) 25 W. R. 315. WN (1877) 45

Solicitor for Petitioner: *S. Dunning.*

Solicitors for Corporation: *James, Son, & James*, agents for *Nanson, Carlisle.*

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(1) 21 W. R. 667. WN (1873) 113,

W. L. C.

In re BROWN, BAYLEY, & DIXON.
Ex parte ROBERTS AND WRIGHT.

FRY, J.
1881
Aug. 4.

Company — Winding-up — Stay of Action—Mortgage—Interest on Mortgage Debt.

20 ChD263
21 ChD328
330-1

Mortgagees having a right of distress to enforce payment of interest will be allowed to distrain after a winding-up for interest accrued while the liquidators were in possession, but not for arrears accrued before the winding-up.

THE applicants in this case were trustees for debenture holders of a company, *Brown, Bayley, & Dixon, Limited,* by virtue of a mortgage dated the 21st of May, 1879, by which certain freehold and leasehold lands, machinery, and fixtures of the company were conveyed upon trust that the trustees might enter and sell and apply the proceeds in payment of the amounts due to the debenture holders.

The deed contained a power for the trustees to distrain in respect of interest which should be in arrear for forty days, as a landlord might distrain in respect of rent.

The company was now in liquidation, the date of the commencement of such liquidation being the 7th of January, 1881.

The sum of £1845 was due in respect of interest on this mortgage on the 31st of December, 1880.

The liquidators of the company took possession of the works and continued in such possession, and carried on the works from the commencement of the liquidation to the date of this application.

This was a motion that the applicants, as trustees of the mortgage of the 28th of May, 1879, might be at liberty to exercise the power of distress for the recovery of the arrears of interest due to the 31st day of December, 1880.

J. Pearson, Q.C., and *Speed*, for the motion:—

Our claim is under a special contract. Mortgagees have a right

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to sell notwithstanding the winding-up: *Lloyd* v. *David Lloyd & Co.* (1); *In re Longdendale Cotton Spinning Company* (2).

North, Q.C., and *H. B. Buckley*, for the liquidators:—

If the mortgagee seizes or forecloses before the winding-up he may retain, but not otherwise: *In re South Kensington Co-operative Stores* (3); *In re Exhall Mining Company* (4); *In re Traders' North Staffordshire Carrying Company* (5); *In re Universal Disinfector Company* (6). A mortgagee's power to foreclose is considered in *Lloyd* v. *David Lloyd & Co.*; *In re Withernsea Brickworks* (7); *In re Stockton Iron Furnace Company* (8).

FRY, J.:—

On the 21st of May, 1879, a deed of mortgage was executed by the company in favour of certain trustees for the debenture holders, and that deed gave by covenant or grant to the trustees a right to enter upon the property of the company and to distrain on chattels and other property there, not being the subject of direct charge or security in the mortgage deed itself. It appears that on the 7th of January a general meeting was held which resolved that it was expedient that a voluntary winding-up of the company should be made, and on the 14th of January a supervision order was pronounced by this Court. The winding-up therefore dates from the 7th of January of this year. It appears that the interest upon the debentures was in arrear up to the 31st of December, 1880, but that from that day it has been paid in full by the liquidators down to the present period. The trustees now apply to the Court for leave to enter and distrain. It is not in dispute that such leave is necessary to their entry: and the question which I have to determine is this, Upon what principle is the discretion of the Court to be exercised in granting or refusing that leave?

Now, one principle has been clearly enunciated, which is this:

(1) 6 Ch. D. 339.
(2) 8 Ch. D. 150.
(3) 17 Ch. D. 161.
(4) 4 D. J. & S. 377. 10 Jun 48.
576.
(5) Law Rep. 19 Eq. 60.
(6) Ibid. 20 Eq. 162.
(7) 16 Ch. D. 337.
(8) 10 Ch. D. 335.

that as far as possible the independent rights of independent persons ought to be respected. The Lord Justice *James*, in the case of *David Lloyd & Co.*, to which my attention has been called, said this, "A power was given to the Court to interfere with actions by restraining them or not allowing them to proceed, but this power was given because it was understood that the Court would exercise it with a due regard to the rights of third persons, persons who were not members of the company, and who had not to come in and claim to share in the distribution of the company's assets among the creditors, and who were not therefore *quasi* parties to the winding-up proceeding. The Court would have due regard to the rights of independent persons. A mortgagee is to my mind such an independent person, and his rights ought not to be interfered with because his mortgagors have chosen to become insolvent, and to have a winding-up." In like manner, a lessor is for many purposes an independent person. His rights ought not to be interfered with, more than is necessary, by reason of his lessee having become insolvent, and having chosen (to use the Lord Justice's expression) to have a winding-up.

There is, however, another principle, which I take to be this, that the Court will administer the assets of a company among all the creditors at the time of the winding-up *pari passu*, and will, so far as is possible, not give any preference or priority between the various creditors. That principle was enunciated very fully by the Master of the Rolls in the case of *In re Traders' North Staffordshire Carrying Company* (1). Speaking of the application which was then made, he said this: "In substance it is getting payment by the creditor out of the goods of his debtor, and a preferential payment as between that creditor and the other creditors of the debtor, and, as I understand it, the very object and meaning of the Act of Parliament was to prevent any such preference being obtainable after the commencement of the winding-up."

Those are the two principles to be considered. In their generality they are manifestly inconsistent. In my view they are to be reconciled by drawing the line at the date of the winding-up.

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(1) Law Rep. 19 Eq. 60, 63.

A mortgagee and a lessor, although in one sense independent persons, are nevertheless creditors of the company in respect of any amount due on the mortgage or on the lease at the date of the winding-up, and, as such creditors, they ought, in my judgment, to have neither preference nor priority. In respect of any rights arising after the winding-up by reason of the company or the liquidators remaining in possession of the demised or of the mortgaged premises, they ought, in my judgment, to be treated as independent persons, and if the company or the liquidator choose to remain in possession of the demised or mortgaged premises, they must so remain upon the terms and conditions of the instrument; just as any other person must observe those terms. In that way, then, I draw the line at the commencement of the winding-up; and I hold that all claims of creditors before that date should be dealt with upon the principle of equality; but that with regard to the rights after that, the company is in no better position because it has become insolvent and has had a winding-up. That appears to me to be consistent with the current of decision which has drawn the line with regard to the exercise of the power of distress in respect of rent accrued before and rent accrued after the winding-up. The practice certainly has grown up of allowing the lessor to distrain or to be paid in full in respect of rent after the winding-up; but with respect to rent before the winding-up, to allow him only his right to compete with the other creditors by proving in the winding-up.

I come very much to the same conclusion on the consideration of the 163rd section. That says, in the first place, that "Where any company is being wound up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress, execution put in force against the estate or effects of the company after the commencement of the winding-up, shall be void to all intents." Why is that? In order that equality may be the rule in the administration of the assets. That restraint on attachments, distresses, and executions is a fetter imposed by the Legislature on the rights of independent persons; no one can doubt that a lessor's right of distress flowing from the relation of landlord and tenant, is one which, in the usual way, is respected by the Court, but nevertheless, for the sake of equality, the exercise

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of that power is restrained. No doubt the Court has, under the general operation of that section and the earlier sections, exercised the right to allow distresses to prevail, but it has allowed them in the way I have already referred to. I think, therefore, this application cannot be granted, and that it must be refused with costs.

Solicitors: *Pattison, Wigg, & Co.*; *Linklaters.*

C. W. C.

In re SLADE.

SLADE *v.* HULME.

[1880 S. 55.]

FRY, J.
1881
Aug. 3.

Sequestration—Divorce Action—Enforcing Sequestration.

A co-respondent in a divorce action was ordered to pay damages and costs, and a writ of sequestration was issued by the Probate and Divorce Division to enforce such order. He was entitled to certain trust moneys which were being administered in a Chancery action:—

Held, that the Court of Chancery had jurisdiction on motion of the sequestrators in the Chancery action to order the trust moneys to be paid to the sequestrators.

WALTER SLADE was co-respondent in an action of "*Weston* v. *Weston*" in the Probate and Divorce Division of the High Court, and that Court made an order, dated the 26th of January, 1878, for payment by *Walter Slade* of £700 damages and the costs of the action.

He made default in obeying that order, and a writ of sequestration was issued on the 17th of January, 1880, whereby power was given to the sequestrators to enter upon all the real estate of *W. Slade*, and to collect, receive, and sequester into their hands not only all the rents and profits of the said messuages, lands, tenements, and real estate, but also his goods, chattels, and personal estate whatsoever, and they were commanded to detain and keep the rents, profits, goods, chattels, and personal estate under sequestration in their hands until *W. Slade* should pay the £700 damages and costs with interest.

Walter Slade was entitled to more than £700 under the will of his father, *Adolphus Frederick Slade*, and the action of *Slade* v. *Hulme* was brought in the Chancery Division for the administration of the said will.

The sequestrators served the trustees of the will of the testator, who were defendants in the administration action, with copies of the writ of sequestration and the usual notices.

On the 9th of July, 1880, an order was made in the administration action by Vice-Chancellor *Malins*, on the application of the trustees and by the consent of the beneficiaries, that the trustees should be at liberty to continue paying to *W. Slade* (notwithstanding the writ of sequestration) the annual sum of £130 on account of income.

On the 27th of June, 1881, it was ordered in Chambers, on the application of the sequestrators, that, notwithstanding the order of the 9th of July, 1880, the sum of £130 should be paid by the trustees to the sequestrators in part payment of the amounts due under the writ unless *W. Slade* should on the 20th of July, 1881, shew good cause to the contrary in Chambers. And it was ordered that the share and interest of *W. Slade* in the estate of the testator, and in the stocks, funds, and securities for the time being representing the same should stand charged with the payment of the £700 and the taxed costs, charges, and expenses of and incidental to the sequestration and of and consequent on the present application, unless as aforesaid.

Walter Slade shewed cause against this order on the 20th of July, 1881, and the matter was adjourned to the Judge in Chambers, and thence into Court.

Cookson, Q.C., and *Fellows*, for *W. Slade*, shewed cause:—

The proceedings of the sequestrators are invalid. The mere issuing of a writ of sequestration against a defendant and the service of it on his trustee is not enough to charge the fund in the hands of the debtor or trustee. The applicants, the sequestrators, can only enforce their charges by means of an independent action.

If the order is against *Walter Slades's* trustees as garnishees

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under rule 2 of Order XLV. the proper affidavits have not been made.

A sequestration order gives no charge on property: *Ex parte Nelson* (1). By Order LXII. of the Rules of Court, 1875, the new rules are not to affect the procedure in divorce proceedings. By the 25th section of 20 & 21 Vict. c. 77, and the 52nd section of 20 & 21 Vict. c. 85, the Court of Probate and Divorce was authorized to enforce its order in the same way as the Court of Chancery, which never uses the process of garnishment: *Stevens* v. *Phelips* (2); *In re Cowans' Estate* (3); *Brocklebank* v. *East London Railway Company* (4); *Johnson* v. *Chippindall* (5).

[FRY, J., referred to *Wilson* v. *Metcalfe* (6); *Ward* v. *Booth* (7); *Crispin* v. *Cumano* (8).]

Glasse, Q.C., and *Smart*, in support of the order:—

We ask, on behalf of the sequestrators, that the order may be made absolute. In *Cowper* v. *Taylor* (9) Vice-Chancellor *Shadwell* held that funds standing in Court to the credit of one cause could be attached to answer sequestration in another cause. But *Claydon* v. *Finch* (10) is an authority for the order we ask for. The order made by Vice-Chancellor *Hall* in *Gee* v. *Mahood* (11) shews the form which the order should take. This was substantially followed in *In re Cowans' Estate*. *Francklyn* v. *Colhoun* (12) and *Wilson* v. *Metcalfe* are in our favour. The sequestrators are authorized to proceed against the debtor's personal estate, which includes *choses in action*: *Bethune* v. *Kennedy* (13); *Reece* v. *Taylor* (41).

Byrne, for the trustees of the will:—

We have notice of one incumbrance upon *Slade's* interest.

Cookson, in reply.

(1) 14 Ch. D. 41.
(2) Law Rep. 10 Ch. 417, 423.
(3) 14 Ch. D. 638.
(4) 12 Ch. D. 839.
(5) 2 Sim. 55.
(6) 1 Beav. 263.
(7) Law Rep. 14 Eq. 195.
(8) Law Rep. 1 P. & M. 622.
(9) 16 Sim. 314.
(10) Law Rep. 15 Eq. 266.
(11) Seton, 4th Ed. 1658.
(12) 3 Sw. 276.
(13) 3 Beav. 462.
(14) 5 De G. & Sm. 480.

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In re SLADE. SLADE *v.* HULME.

FRY, J.:—

The question in this case arises upon the order *nisi* which has been made by me in the administration action of *In re Slade, Slade* v. *Hulme,* upon the application of the sequestrators appointed by the Probate and Divorce Division. By the orders made in the divorce suit, *Walter Slade,* one of the Plaintiffs in the Chancery action, was ordered to pay damages to the amount of £700 and costs, which amounted to nearly £170. He did not pay these sums, but was in contempt, and a writ was issued to four sequestrators, directing them to collect, recover, and sequester into their hands, not only all the rents and profits of *Walter Slade's* messuages, lands, tenements, and real estate, but also his goods, chattels, and personal estate whatsoever. That writ was issued in pursuance of the Act regulating the Divorce Court, by which the same effect is given to the writ as it would have had if it had been issued by the Court of Chancery. Then in the month of June, 1880, the writ was served on the trustees of the will of the testator in the administration action, and on the 9th of July, 1880, Vice-Chancellor *Malins* ordered that, notwithstanding the writ of sequestration, the trustees should be at liberty to continue to pay to *Slade* the annual sum of £130 on account of the income of his share in the testator's estate. That was an order which, as it appears to me, was perfectly proper, for it is plain that where sequestrators desire to obtain possession of a *chose in action* they must take some step, they must do something to assert their right to that particular *chose in action.* Down to the time of that order of the Vice-Chancellor, the sequestrators had done nothing, so that the case was within the scope of *Ex parte Nelson* (1). Now, however, they have done something; they have obtained the order *nisi* which forms the subject of the present discussion. The question thereupon arises—was this step which the sequestrators have taken a proper or an improper one? Can the sequestrators proceed in the existing action, or must they commence independent proceedings? The first case on the subject is that of *Simmonds* v. *Lord Kinnaird* (2), but in that case the bill which was filed never came to a hearing. Next

(1) 14 Ch. D. 41.

(2) 4 Ves. 735.

comes *Francklyn* v. *Colhoun* (1), which was before Lord *Eldon* in the year 1819. There the Lord Chancellor ordered a person named *Rucker* to pay into Court a sum of money which was alleged to be due from him to the person against whom the sequestration was issued, and this was done though *Rucker* was a stranger to the suit in which the order was made. That is a strong case on the subject. The Lord Chancellor said this (2): "Speaking with the caution which befits one of a process so unusual, I have supposed it to be clear that, where there is tangible property, the Court will allow the sequestrators to lay their hands on it, whatever claims third persons may have, and will compel them to come in *pro interesse suo ;* but a *chose in action* cannot be so taken, and the question arises, how are the rights of third persons to be decided? It is generally done by order; whether it can be done in a case in which the third person does not appear may be another question." Those observations are, however, not precisely in point here, for here it is not a case of an order being sought against a stranger to the action, but of an order being sought by strangers to the action. The next case is *Johnson* v. *Chippindall* (3), but that throws very little light on the subject; all it decided was that an order to pay into Court the arrears of an annuity could not be made on motion against a stranger to an action when the sequestrator was not a party to the action. Then comes *Wilson* v. *Metcalfe* (4); that was also an application against a stranger, but the order was made on the submission of the stranger, so that that case is not quite the same as the present one. The Master of the Rolls, however, said this: "It appears to me that in such a case as this a *chose in action* is subject to the process of sequestration, but how the sequestration is to be effected in respect of *choses in action* may be a question requiring much consideration; in a clear and simple case it may be by order only, or a voluntary payment may be protected; in other cases it may be necessary to resort to an action or suit under the direction of the Court." Then comes *Ward* v. *Booth* (5),

(1) 3 Sw. 276.

(2) Ibid. 310.

(3) 2 Sim. 55.

(4) 1 Beav. 263.

(5) Law Rep. 14 Eq. 195.

where the suit was brought by the person at whose instance the sequestration was issued; but the question was chiefly as to the priority of the sequestration, so that resort was had to a bill. That case does not decide whether the order might or might not have been made upon motion. Last comes the case of *Claydon* v. *Finch* (1), where an order was made in an action on the petition of the sequestrators; that case is by far the nearest to the present. The only observation which has been made against the authority of that case is that the point appears not to have been fairly raised there; however that may be, the Vice-Chancellor evidently thought that he had jurisdiction, and the case is an authority in point. That exhausts all the authorities on the subject, and it may be observed that there is no case which says that an action is necessary, while there is at all events one case which says that, in circumstances like the present, an order may be made in an existing action at the instance of the sequestrators. I ask myself if there is any inconvenience in so making such an order, and I answer that I can find none. The Court is administering the estate of a deceased testator, and one of the persons interested under the will of that testator has, in effect, incumbered his interest in the estate. Nothing is more common than for the Court to assist an incumbrancer, though not a party to the action; and in giving effect here to the sequestration, I am only in effect allowing an incumbrancer to assert his claim. I shall, therefore, hold that the application of the sequestrators by way of motion in this action was regular, and that the order *nisi* was properly made.

The remaining question is whether the order is in the correct form; and as to this I am of opinion that the proper form would have been to direct payment of £130 per annum by the trustees to the sequestrators, and to order that no other moneys should be paid to *Walter Slade* without previous notice being given to the sequestrators.

The order *nisi* will be made absolute, altering it to the form in which I think it should originally have been made, and it must be made subject to the rights of the incumbrancer, of whose

(1) Law Rep. 15 Eq. 266.

prior incumbrance the trustees have notice, and of the other prior incumbrancers, if any. The costs of the adjournment into Court must be paid by *Walter Slade*.

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In re SLADE.
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Solicitors for *W. Slade*: *Stibbard, Gibson, & Co.*
Solicitors for Sequestrators: *Routh, Stacey, & Castle.*
Solicitors for Trustees: *Lucas & Son.*

C. W. C.

KAY, J.
1881
May 31.

RULE *v.* JEWELL.

[1880 R. 1321.]

Cost-book Mine—Partner—Claim—Lying-by—Lapse of Time.

At a meeting of the partners in a cost-book mine held in 1874, it was stated that the mine was £2003 in debt, and a call of £25 was made upon each of the six shares in the mine. Two of the partners did not pay this call, and were in arrear for other calls. At subsequent meetings in June, 1874, the shares of these partners were declared to be forfeited. These two partners took no steps as to the mine until July, 1879, when they made a claim, and in September, 1880, they brought an action, alleging that the shares had not been regularly forfeited, and claiming to be still partners. It appeared that the mine was in debt in 1878:—

Held, that even assuming the shares not to have been regularly forfeited, the Plaintiffs, under the circumstances, could not, after lying by for more than six years, successfully assert their claim to be partners.

Clarke v. *Hart* (1) distinguished.

UNDER an agreement made on the 11th of January, 1871, *Joseph Rule* and *John T. Rule*, the Plaintiffs, and *J. H. Jewell* and *W. J. Hocking*, and one *Edward Wilkins* (who afterwards assigned his interest to *Hocking*), became partners in a Cornish mine worked on the cost-book principle, the undertaking being held in six parts or shares, to two of which *Joseph Rule* and *J. T. Rule* were entitled. In May, 1874, a meeting was held, when the accounts shewed a balance of £2003 against the mine, and a call of £25 a share was made. At the same meeting it was resolved that all shares on which arrears of calls should remain due on the 8th of June should be forfeited. The resolutions were signed by *Hocking*, *Wilkins*, and *J. H. Jewell*. *Joseph Rule* and *John T. Rule* did not pay these calls of £25 when due, and it was said that money was due from them on a previous call. At a meeting held on the 9th of June it was resolved that their shares be forfeited. This resolution was confirmed at another meeting held on the 24th of June, but there appeared to have been irregularities in the meetings. There were meetings in 1875 and in 1878 at which further calls were made, but nothing further was done by either of the Plaintiffs until July, 1879, when they made a claim to their shares. On the 3rd of September, 1880, they commenced this action, alleging that the calls had been irregularly made, that the proceedings at the meetings were irregular, and that their shares were not forfeited, and claiming to be partners in the mine with the Defendants *J. H. Jewell* and *W. J. Hocking*.

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(1) 6 H. L. C. 633. 5 Jur. N.S. 447

The statement of defence alleged that the shares of the Plaintiffs had been regularly forfeited, and that from 1874 to 1879 the mine had been a losing concern, as the Plaintiffs well knew, and that it was only owing to the extraordinary rise in the price of tin in the latter part of the year 1879 that the mine had become valuable; and the Defendants claimed the benefit of the *Statute of Limitations.*

Rigby, Q.C., and *Chadwyck Healey*, for the Plaintiffs:—

The power of forfeiting shares is *strictissimi juris*, and if it has been irregularly exercised, mere acquiescence will not bar the claim: *Clarke* v. *Hart* (1). In *Prendergast* v. *Turton* (2) the circumstances were different. Here the meeting was irregular, and due notice of the forfeiture was not given: *Clements* v. *Hall* (3); *Garden Gully United Quartz Mining Company* v. *McLister* (4); *Norway* v. *Rowe* (5). If the mine was so much in debt, the call was absurd, and it was, in fact, made merely to get rid of the Plaintiffs. If it appears that the Defendants have advanced money and have thereby made the mine profitable, the Plaintiffs may be put upon terms. They were legally partners, and must remain so unless they are shewn to have been properly removed.

Witnesses were examined to prove the allegations made in the statement of claim and by counsel. The effect of the evidence is stated by his Lordship in the judgment. It appeared that though by calls and otherwise the balance had been reduced, there was in 1878 a balance of £926 against the mine.

Higgins, Q.C., and *Northmore Lawrence*, for the Defendants, were not called upon.

(1) 6 H. L. C. 633. 5 Jur N.S. 447

(2) 1 Y. & C. Ch. 98; on appeal, 13 L. J. (Ch.) 268.

(3) 2 De G. & J. 173. 4 Jur N.S. 495

(4) 1 App. Cas. 39.

(5) 19 Ves. 144.

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KAY, J., after stating the facts and the manner in which, on the evidence, the calls appeared to have been made and the forfeiture appeared to have been declared, continued :—

Now the first question is whether that was a proper forfeiture of the shares. I have not heard the other side, but it seems to me that it was not a proper and regular forfeiture of the shares according to the provisions of the Stannaries Acts, and I shall deal with the case as though the forfeiture was in point of law invalid.

Then I have to consider what happened afterwards. The *Statute of Limitations* has been pleaded, but I think it has been truly said that, there having been no valid forfeiture on the 9th of June, the *Statute of Limitations* could not begin to run against the Plaintiffs from that time. They would remain shareholders in law and in equity, if the word "shareholders" be applicable, or they would still remain partners notwithstanding what was done on that day. Therefore the *Statute of Limitations* would not be a good plea to their claim to maintain their partnership.

But I have to consider that this was a mining adventure, which is, as Lord *Eldon* long ago said (1), a species of trade, and there is a very well settled course of decision, according to which I must now decide, whether these Plaintiffs have a right to maintain their present claim after the lapse of time which has occurred between the 9th of June, 1874, about which time they received notice of the forfeiture, and the 3rd of September, 1880, when they issued the writ in this action. Now, how is that delay accounted for? I will read from the evidence which has been given by these two Plaintiffs themselves. [His Lordship then read and commented on the evidence, coming to the conclusion that each of the Plaintiffs must have been aware of what had been done, and that neither of them, from June, 1874, until July, 1879, ever made or suggested any claim to be a partner in this concern, or ever offered, nor had either of them now by the pleadings offered, to pay the calls.] In that state of things I have to consider whether this case comes within the well-known authority of *Prendergast* v. *Turton* (2), or the later case of *Clarke* v.

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(1) *Williams* v. *Attenborough*, T. & R. 70.

(2) 1 Y. & C. Ch. 98; on appeal, 13 L. J. (Ch.) 268.

Hart (1). [His Lordship then stated the facts of the latter case as reported.]

Now, I want to know what similarity there is between the two cases. There is the broad and plain distinction that *Hart* had a legal interest in the mine. He was one of three lessees of the mine, and, of course, if his share was forfeited, he must have been declared a trustee of that third share for his co-adventurers. I have nothing like that here, as it does not appear that there is anything like legal property in these two Plaintiffs. There was also an interval of time very much shorter than occurs in this case. Then the attempted forfeiture was a conditional forfeiture not treated as an absolute forfeiture, and three years after that the bill was filed. But in this case I have an interval of time which more than covers the statutory period of limitation, by analogy to which a Court of Equity generally acts, during which interval no claim whatever was made by either of these Plaintiffs upon their co-partners, nor was there any offer to pay the arrears of their calls, unless I am to treat a statement which one of them says he made to *Hocking* that he should raise an action when he had the means to do it, as being an intimation of the kind. I have not heard the other side, and I do not know what *Hocking* would say, but I treat that as being anything but such an intimation as was given in the case of *Clarke* v. *Hart*. But then I am told that a rule is established by that case that if there be a legal interest in a person which has been improperly attempted to be forfeited, then, notwithstanding his lying by for a considerable period, that legal interest is not determined by mere acquiescence; and I am referred to certain paragraphs in the judgments in that case. I will take the most striking of them, which occur in the judgment of Lord *Chelmsford* (2): "It is necessary to consider a distinction which was suggested during the argument which must be borne in mind, and which, in my opinion, will reconcile the authorities upon the subject. The distinction to which I advert was that which has been expressed very shortly and very intelligibly by the difference between 'executed' and 'executory interests.' Where a person is obliged to apply for the peculiar relief afforded by a Court of Equity to enforce the performance of an agreement or to declare a trust or to obtain any

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(1) 6 H. L. C. 633. 5 Jur NS. 447 (2) 6 H. L. C. 655. 5 Jur NS 450

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other right of which he is not in possession, and which may be described as an executory interest, it is an invariable principle of the Court that the party must come promptly, that there must be no unreasonable delay; and if there is anything that amounts to laches on his part Courts of Equity have always said, We will refuse you relief. With regard to interests which are executed the consideration is entirely different. There mere laches will not of itself disentitle the party to relief by a Court of Equity; but a party may by standing by, as it has been metaphorically called, waive or abandon any right which he may possess, and which under the circumstances, therefore, a Court of Equity may say he is not entitled to enforce." Now, that means, that with regard even to interests which are executed, a partner may, by standing by, waive or abandon his right. In a later passage Lord *Chelmsford* comments on *Prendergast* v. *Turton* (1), and says that in that case distinct notice was given to the partner that his shares were forfeited, and he took no steps whatever to assert his interest for a period of upwards of nine years. And without in the least degree attempting to throw doubt upon the decision in that case (which I may observe by the way was a well-considered decision of two great Judges, the then Vice-Chancellor *Knight Bruce*, and Lord *Lyndhurst* on appeal), Lord *Chelmsford* contrasts the case before him with that case, and says (2), that in that case there was not only no such notice given, but there "was quite sufficient to induce him to believe that he still continued to be a partner in the concern, that his shares had never been forfeited, and that therefore there was no necessity for him to do more than assert his rights, as he did in the correspondence which took place between the parties upon the subject of the forfeiture of the shares." There you have the whole gist of that decision. Lord *Chelmsford* does not say that even in the case before him, if there had been a standing by for more than six years without any claim or assertion of right whatever, after distinct notice or knowledge that the shares had been purported to have been forfeited, he would not hold the case to come within *Prendergast* v. *Turton*; still less does he suggest that *Prendergast* v. *Turton* was not a perfectly good decision and a binding authority. Nor do I find anything in the other judgments which in the least degree alters the view of the law which seems to have been taken by Lord *Chelmsford*. Lord *Cranworth* says (1), "With regard to the declaration of forfeiture said to have been made on the 31st of May, 1850, as a matter of fact I arrive at the conclusion that no such declaration was ever made." Afterwards he says that the result of their acts "amounted to this, that the two other partners, *Clarke* and *Chapman*, intimated to *Hart* that they no longer meant to go on with him—that they considered that his shares were forfeited. His conduct upon that was this—he said 'I dispute your right, I deny that my shares are forfeited, and you must proceed as you think fit.' Now after that, the result was, that if they chose to go on trading, then according to all the ordinary principles of equity they were trading on behalf of the partnership." Then, again, he says, that the argument was that "he had lost his right by lying by. Now, for that proposition I can find no authority either in principle or in argument, because the person wrongfully excluded had from the first moment denied their right to exclude him; he had said expressly, I deny your right to exclude me; I shall remain a partner." Lord *Wensleydale* says (2): "Now it appears to me that the principle to be deduced from the cases of *Prendergast* v. *Turton* and *Norway* v. *Rowe* (3) is, that, if a party lies by, and by his conduct intimates to the other partners in the concern that he has abandoned his share, they may then deal with it as they please; if his conduct amounts to a representation of that sort he is estopped by it, and cannot afterwards complain."

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(1) 1 Y. & C. Ch. 98; on appeal, 13 L. J. (Ch.) 268.

(2) 6 H. L. C. 659. 5 Jur

N.S. 457.

In *Prendergast* v. *Turton* (4) a so-called joint stock company was established in 1825 to work a mine, and certain calls were made as to which there was a question whether they were validly made or not. The plaintiffs declined to pay those calls, and there was a delay of nine years, which might be made up to eleven years. The Lord Justice, then Vice-Chancellor, *Knight Bruce*, said (5): "This is a mineral property, a property therefore of a mercantile nature, exposed to hazard, fluctuations, and contingencies of various kinds requiring a large outlay and producing, perhaps a considerable amount of profit in one year and losing it the next. It requires, and of all properties perhaps the most requires, the parties interested in it to be vigilant and active in asserting their rights. This rule, frequently asserted by Lord *Eldon*, is consonant with reason and justice. Lord *Eldon* always acted upon it, and has been followed by subsequent Judges of great knowledge, experience, and eminence. Now, in the present case, conceding, for the sake of argument, that the shareholders could not be compelled to contribute beyond £50 a share and did no wrong in declining to make advances beyond that sum, yet the result of all the circumstances of this case appears to have been that the mine could not be carried on without further outlay. The plaintiffs objected to this further outlay, and then a considerable discussion ensued which was substantially concluded in 1828. Some subsequent letters were written, but they did not, I think, materially vary that state of the case;" and then he states that they carried on the concern, that in 1837 affairs began to look better, and he proceeds: "Matters go on in this manner in 1836 and 1837, and it was not till November, 1837, when the result of the struggle had appeared, that, after a profit had been made by the unassisted efforts of those who still adhered to the speculation, the Plaintiff and Miss *Kent* applied for and claimed their shares." That is nine years after 1828 when the discussion as to those calls had come to an end. And he held, upon the ground of the peculiar nature of a mining concern, that the Plaintiffs had no right to stand by and wait till it appeared clearly that it was worth their while, and then come and assert their interest in the mine. In that case the interest was just as much a legal interest as in this case. If this be in any sense of the term a legal interest, so it was in *Prendergast* v. *Turton* (1), and there the interest was treated as having been abandoned, if that be the proper word to use, or was an interest which, in the more accurate language of Lord *Wensleydale*, the plaintiffs were estopped from asserting against a co-partner after an amount of delay which I may take to be nine years. That was affirmed by the Lord Chancellor, Lord *Lyndhurst*, on appeal (2). He says: "This Court can never sanction this sort of conditional acquiescence. To allow the party to lie by, in a case of this nature, to watch the course of events—to urge his claim, if it should be to his advantage to do so, and to abandon it on a continuance of misfortune and loss, which as a proprietor he must have shared, would be at variance with the plainest rules of justice."

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(1) 6 H. L. C. 664. 5 Jur NS 1510
(2) Ibid. 670. 5 Jur NS 657
(3) 19 Ves. 144.
(4) 1 Y. & C. Ch. 98.
(5) 1 Y. & C. Ch. 110.

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(1) 1 Y. & C. Ch. 98.

(2) 13 L. J. (Ch.) 268, 269.

Now I have no hesitation in saying, looking at these cases and considering carefully the circumstances of each, that the case before me comes very much nearer to *Prendergast* v. *Turton* (1) than to *Clarke* v. *Hart* (2). The differences are said to be these. It is said that in *Prendergast* v. *Turton* the mine was actually worked for a time at a loss, and that in this case the mine was not worked at a loss. But I have this fact very plainly proved, that the notice given to these Plaintiffs in 1874 was that the balance was £2003 against the adventurers, and it is stated that in 1878 it was £926 against them. So that the working from 1874 to 1878, if not at a loss, did not clear off the balance against the adventurers. During that time the Plaintiffs clearly lay by, and can I have the smallest doubt that if this mine had turned out to be a losing affair instead of a profitable one, they would never have asserted any claim to be partners. I have not the least doubt of it. I think the lying by here was entirely analogous to the lying by in the case of *Prendergast* v. *Turton*. It was a lying by to wait and see whether the concern turned out sufficiently profitable to make it worth while to assert their claim to be partners; and when they think the time is come when it is worth their while to assert their title then they bring their action. The time during which they lie by being more than six years, I consider the analogy of the *Statute of Limitations* to be one which is applicable, as it is impossible to lay down a hard and fast rule what amount of time shall be sufficient in every case. Looking at all the facts of the case, I am of opinion that that period of over six years during which no claim was made was such a lying by as in *Prendergast* v. *Turton* was treated as a complete estoppel to the plaintiffs' right to make such a claim. Whether it is called abandonment or estoppel seems to me to be indifferent. If it were necessary to call it abandonment, I should be quite prepared to hold that what has taken place in this case amounts

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(1) 1 Y. & C. Ch. 98.

(2) 6 H. L. C. 633. 5 Jur Ns 449

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to abandonment as between the Plaintiffs and their co-adventurers of any interest in this concern.

I therefore dismiss this action with costs.

Solicitors for Plaintiffs: *Morten & Cutler.*

Solicitors for Defendants: *Gregory, Rowcliffes, & Co.*, agents for *Hodge & Co., Truro.*

C. M.

KAY, J.
1881
June 20.

HENRY *v.* ARMSTRONG.

[1880 H. 67.]

Setting aside Voluntary Deed—Onus—Power of Revocation.

When a voluntary deed is impeached the *onus* of supporting it does not necessarily rest upon those who set it up. Nor is a voluntary deed of settlement voidable by the settlor merely because it does not contain a power of revocation.

T. *E. J. HENRY*, the Plaintiff in this case, was married to his wife in 1865. He had property to the amount of about £1300 a year, and being about to go into business on the *Stock Exchange*, he, on the 7th of August, 1872, executed a deed conveying specified real estate and personal estate, being, in fact, all his property except about £1000, to two trustees upon trust for the separate use of his wife for life, with remainder to his children or their issue as therein mentioned. On the 7th of February, 1880, the Plaintiff *Henry*, the settlor, brought this action, alleging that he had executed the deed in ignorance of its true purport and effect, and praying to have it set aside.

Whitehorne, Q.C. (*Everitt* with him), for the Plaintiff:—

The Plaintiff was ignorant of the effect of the deed, and did not know that practically all his property was comprised in it. He absolutely deprives himself of all his property, and the *onus* is on those who set up such a deed.

[KAY, J.:—That was said in *Cooke* v. *Lamotte* (1). Has that ever been followed?]

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(1) 15 Beav. 234.

Besides, there is no power of revocation in this deed, and such a power must never be omitted without special directions: *Harbidge* v. *Wogan* (1); *Nanney* v. *Williams* (2); *Coutts* v. *Acworth* (3).

The Plaintiff and another witness were examined, after which it was admitted by counsel for the Plaintiff that his case as to ignorance was not made out.

Higgins, Q.C., and *A. Brown*, for the wife and children, and

Rigby, Q.C., and *Daniel Jones*, for the trustees of the deed, were not called upon.

KAY, J.:—

I have no hesitation in dismissing this action with costs.

No doubt there are to be found in reported cases *dicta* to the effect that the *onus* of supporting a voluntary deed rests upon those who set it up; but I do not think that these *dicta* go so far as to say that whenever a voluntary settlement is impeached on any ground whatever the *onus* is at once thrown on those who would maintain it. As I understand it, the law is that any body of full age and sound mind who has executed a voluntary deed by which he has denuded himself of his own property, is bound by his own act, and if he himself comes to have the deed set aside—especially if he comes a long time afterwards—he must prove some substantial reason why the deed should be set aside.

Now, the grounds on which the Plaintiff relies in this case are that he did not fully understand the purport of the deed, and also that it is irrevocable. As to the last ground, I was told that at the time when he executed the deed he was going into business on the *Stock Exchange*, and his object in executing the deed, which it is said was pressed upon him by his father-in-law, was to protect his wife and children. It is very common that a man should execute such a deed when he goes into business, and the ordinary way is that the deed should be drawn without any power of revocation, because if there is a power of revocation and he falls into

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(1) 5 Hare, 258.

(2) 22 Beav. 452.

(3) Law Rep. 8 Eq. 558.

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difficulties or becomes bankrupt the assignment of his property would be practically useless. Such a power would in this case be entirely inconsistent with the objects which I am told the Plaintiff had in executing this deed. Then it was said that there might have been a power of revocation to be exercised with the consent of the trustees, but in what conceivable circumstances could such a power be exercised? The settlor had a wife and children who were the objects of the settlement, and it would be impossible for the trustees, if they did their duty, to have it revoked in the smallest particular. Any such power would be an idle thing in such a case as this. Therefore I disregard the circumstance that in this settlement there is not any power of revocation, for any such power would be inconsistent with the objects of the settlement.

The other objection is that the Plaintiff did not understand that the whole of his property was comprised in the settlement.

His Lordship then went through and commented on the evidence, coming to the conclusion that there was no ground for saying that the Plaintiff did not understand the effect of the deed. Nor was there any trace of undue pressure. The action must be dismissed with costs.

Solicitors for Plaintiff: *Saxton & Morgan.*
Solicitors for Defendants: *Allen & Edwards.*

C. M.

KAY, J.
1881
June 23, 24.

HART *v.* HART.

[1880 H. 3253.]

Compromise of Divorce Suit—Specific Performance of Separation Deed—Jurisdiction of Court—Custody of Children by Wife—Agreement not too vague—"Usual Covenants"—Dum Casta Clause—Reference to Arbitration—Evidence—Mistake.

The Plaintiff, Mrs. *H.*, who was the wife of the Defendant, claimed specific performance of an agreement for a separation deed entered into upon the compromise of a suit in the Divorce Court which was instituted by the husband against the wife for a divorce on the ground of adultery. The agreement was signed by both husband and wife after the husband's evidence in support of his case had been heard and before the wife's defence had been commenced, and was in these terms:—"Petition and answer dismissed. Deed of separation with usual covenants; costs of preparing deed to be borne by Mr. *H.* Mr. *H.* to pay Mrs. *H.* for herself and child or children £150 a year quarterly. Mrs. *H.* to maintain the child or children. Mr. *H.* to pay wife's costs. In case of difference in working out these terms matter to be referred to Mr. *W.* and Dr. *D.*" (the leading counsel on each side):—

Held, that this Court had power to enforce specific performance of an agreement for a separation deed and for the compromise of a suit in the Divorce Court without infringing the *Judicature Act* prohibiting interference with proceedings pending in another branch of the Court:

That the Court would not refuse specific performance of an agreement for a separation deed on the ground that it provided for the wife having the custody of the children:

That husband and wife were competent to make a binding agreement for compromise of a divorce suit, and that this agreement was not too vague to be enforced by the Court:

That a *dum casta* clause did not come within the term "usual covenants" in a separation deed agreed to as part of the terms of compromise of a divorce suit:

That the Court would construe the term "usual covenants" in reference to surrounding circumstances, but the adultery of the wife not having been proved could not form an element for the consideration of the Court:

That the agreement on the face of it being complete, the arbitration clause could only come into force in case of difference between the parties, and did not oust the jurisdiction of the Court to settle the deed itself.

Decree for specific performance; the deed of separation to be settled in Chambers if the parties differed, and no *dum casta* clause to be inserted.

It is no answer to a suit for specific performance for Defendant to say that though he understood what the words of the agreement were, he was under a mistake as to their legal effect.

THE Plaintiff, *Louisa Hart*, was married to the Defendant, *Henry Hart*, in April, 1875. On the 2nd of May, 1879, a petition was filed by the Defendant in the Divorce Court against the now Plaintiff as Respondent and certain co-Respondents, praying for a dissolution of the said marriage on the ground of the adultery of the present Plaintiff, to which petition the Plaintiff filed an answer making counter-charges against her husband, and also praying for a dissolution of the marriage. The petition came on for trial on the 14th of February, 1880, when, after the husband's case had been concluded, and before the wife's case was opened, an arrangement was agreed upon between the Plaintiff and Defendant through their respective counsel, Mr. *Willis* and Dr. *Deane*, which was in the following terms:—"Petition and answer dismissed. Deed of separation with usual covenants. Costs of preparing deed to be borne by Mr. *Hart*. Mr. *Hart* to covenant to pay Mrs. *Hart* for herself and child or children £150 a year quarterly. Mrs. *Hart* to maintain the child or children. Mr. *Hart* to pay wife's costs. In case of difference in working out these terms matter to be referred to Mr. *Willis* and Dr. *Deane*. Signed, *Henry Hart*, *Louisa H. Hart*."

In pursuance of this agreement the trial was not proceeded with, and the Plaintiff caused the draft of a deed of separation between the Plaintiff and Defendant to be prepared, but the Defendant refused to execute such deed, and the Plaintiff now claimed specific performance of the agreement and the execution of a proper deed of separation according to the terms of the agreement, and payment by the Defendant of the annuity and costs thereby agreed to be paid by the Defendant, together with the costs of this action.

The Defendant, by his answer, alleged that he signed the agreement of the 14th of February, 1880, during a moment of excitement, and that the same was unreasonable, and especially that the provision giving the Plaintiff £150 a year was excessive, and far exceeded the amount the Court would allow by way of alimony; that the arrangement was purely voluntary on his part, and he did not admit that it had ever been signed by the Plaintiff; that no person was named or appointed by the terms of the arrangement to indemnify the Defendant against the debts of the Plaintiff, and that there was no sufficient consideration to support the said arrangement or alleged agreement; that during the negotiations which took place with a view to the arrangement, the Defendant insisted, and had ever since insisted, that the separation deed should contain a clause providing for the validity of the deed only and so long as the Plaintiff should continue to lead a chaste life, and it was only on this ground and with the understanding that the words "deed of separation with usual covenants," as used in the said terms of arrangement would secure the insertion of such a clause in the deed of separation that he signed the said terms of arrangement. For these reasons, and particularly because the separation deed as prepared by the Plaintiff's solicitors, contained no *dum casta* clause, he had refused to sign it, and should continue to refuse unless ordered to execute it by this Court.

The Defendant further alleged that the Plaintiff had been living an unchaste life since the 14th of February; that there was only one child of the marriage, namely, *Josepha Louise Hart*, born on the 27th of March, 1877, and she was residing with the Plaintiff; and the Defendant submitted that the Plaintiff was not a fit and proper person to have the charge of the infant, and that the Plaintiff ought not to be allowed to have the maintenance and education of the child, and that he ought not to be ordered to execute a separation deed whereby the maintenance and education of the child should be committed to the Plaintiff.

The Defendant had also put in a counter-claim alleging that at various times subsequently to the 14th of February, 1880, when the compromise of the divorce suit took place, the Plaintiff had committed acts of adultery; that the Defendant had not received any benefit from the terms of the arrangement; that the clause "Mrs. *Hart* to maintain the child and children" could not be enforced against the Plaintiff, because it was not for the interest of the child of the marriage, and was contrary to public policy; that the Defendant signed the terms of arrangement on the understanding that the Plaintiff should live a chaste life, which she had not done, and that the Defendant had acted under a misapprehension (which was shared in by the Plaintiff) at the time he signed the terms of arrangement, that a *dum casta* clause was included in the words "usual covenants," as used in the terms of arrangement, and that he was advised and believed that such a clause ought to have been specially mentioned and provided for. He therefore claimed that the terms of arrangement might be cancelled, or, in the alternative, that in any separation deed prepared and executed by the Plaintiff and Defendant, it should be provided that such deed should be valid and enforceable only if the Plaintiff had lived chastely since the 14th of February, 1880, and so long only as she should continue to live chastely.

On an application to the Master of the Rolls, his Lordship ordered the counter-claim of the Defendant to be struck out.

The cause was transferred to Mr. Justice *Kay*.

Rigby, Q.C., and *Chapman Barber*, for the Plaintiff:—

What we propose to do is to bring witnesses to shew that in a separation deed between husband and wife, prepared in compromise of a divorce suit, a clause providing that an annuity be paid by the husband to the wife only so long as she continues chaste, would not be one of the "usual covenants."

Higgins, Q.C., and *S. Stephens*, for the Defendant, said they intended to prove that the arrangement entered into for the compromise of the suit was not consistent with what the Defendant understood it to be. The Defendant believed that the agreement would provide for the continuance of the annuity so long only as the Plaintiff should lead a chaste life, and they had evidence to show that that was the understanding of both parties. It was also intended to call witnesses as to the fact of adultery on the part of the wife since the separation and since the execution of the agreement, upon which they should submit that the agreement would be void and could not now be enforced.

Rigby, Q.C., opposed the introduction of such evidence, and submitted that the agreement must be construed in accordance with the words of the document already signed by the parties, and that no parol evidence could be admitted to vary that written document.

KAY, J., said he could not allow evidence to be produced by the Defendant as to the subject of the counter-claim which had already been ordered by the Master of the Rolls to be struck out. The Defendant could not now set up a claim to have the terms of the arrangement set aside on the ground that he did not understand it, for that was not pleaded in his defence. What he pleaded was that he had insisted that the separation deed should contain a *dum casta* clause, and it was on the understanding that the words "deed of separation with usual covenants" would secure the insertion of such a clause that he signed the terms of arrangement, and he says it was, in fact, a term of the said agreement proposed by the Defendant through his agents and assented to by the Plaintiff through hers, that the deed should contain a clause of that nature. There appeared now to be a question whether those words "usual covenants" would include a *dum casta* clause. The Defendant might have supposed that they would, but all the Court could now do was to construe the terms of the agreement as

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they were signed by the Defendant, and he would not allow parol evidence to be given to shew that anything was intended beyond what appeared upon the agreement, which was that the deed should contain the "usual covenants" in a separation deed.

His Lordship also refused to allow evidence to be gone into to prove adultery on the part of the Plaintiff since the compromise of the suit, because it would not affect the question whether or not there was to be specific performance of the agreement, as the separation deed would contain other important clauses quite apart from the allowance of an annuity.

The counsel for the Defendant were then called upon to prove their case.

The witnesses called on behalf of the Defendant to prove whether a *dum casta* clause was or was not a usual covenant in a separation deed were Dr. *Deane*, Q.C., the leading counsel for the wife in the Divorce Court; *Willis*, Q.C., the leading counsel for the husband; *Searle*, junior counsel for the wife.

The witnesses on the same point called for the Plaintiff were *Wolstenholme*, conveyancing counsel to the Court, *Widcombe* and *Dunning*, barristers practising as conveyancers.

Their evidence will be found referred to in the judgment of the Court.

Higgins, Q.C., and *S. Stephens* :—

This application is distinctly in contravention of the *Judicature Act*, 1873, section 24, sub-section 5, because the real object is to restrain proceedings in another branch of the Court. The Divorce Court is quite capable of carrying out this agreement, which was entered into in face of the Court, and there is no necessity for the Plaintiff to come here for that purpose. Although the terms of the agreement are to dismiss the petition, still no order has been made for dismissal of the suit which is now pending. This contract might have been enforced by a motion in the divorce suit without bringing a fresh action in this branch of the Court: *Dawson* v. *Newsome* (1); *Pryer* v. *Gribble* (2).

Our second point is this. We have here an agreement that in

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(1) 2 Giff. 272. 6 Jur NS 625. (2) Law Rep. 10 Ch. 534.

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case of difference the matter is to be referred to Mr. *Willis* and Dr. *Deane.* We say that it is of the essence of the whole agreement that any questions arising should be decided by these gentlemen. It was more than an ordinary arbitration. It was left to the two leading counsel in the suit to say what the covenants should be, and what clauses should be inserted. The case comes within *Scott* v. *Avery* (1), where it was held that until the award no action was maintainable, and *Scott* v. *Corporation of Liverpool* (2), where upon a covenant to pay what should be awarded by arbitrators the Court held that no demand could be made till after the award. *Waring* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (3) and *Gourlay* v. *Duke of Somerset* (4) are cases of the same description.

Another reason why the Court should not carry out this agreement is because it is contrary to the Act of 36 Vict. c. 12, the 2nd section of which, after enacting that a separation deed shall not be void by reason only of the father of an infant giving up the custody of such infant to the mother, provides that no Court shall enforce any such agreement if it will not be for the benefit of the infant to give effect thereto. Now we can shew that the Plaintiff in this action is not a fit person to have the care of the child, and since the compromise of the divorce suit circumstances have arisen to prove that fact.

Then with regard to the *dum casta* clause, we have the evidence of the two learned counsel to whom these questions were to be referred stating that such a clause ought to be inserted in a deed of separation. "Usual covenants" must have reference to the surrounding circumstances; this was held in *Hampshire* v. *Wickens* (5); and though a *dum casta* clause may not be usual in an ordinary separation deed, it may be usual, and certainly is a most proper provision in a separation deed upon the compromise of a suit against the wife for a divorce on the ground of the adultery of the wife.

[They referred to *Key* and *Elphinstone's* Precedents in Conveyancing (6), in which a *dum casta* clause is inserted.]

(1) 5 H. L. C. 811. 2 Jur NS 815
(2) 3 De G. & J. 334. 5 Jur NS 105
(3) 7 Hare, 482.
(4) 1 V. & B. 68.
(5) 7 Ch. D. 555.
(6) Vol. ii. p. 1031.

Rigby, Q.C., and *Chapman Barber*, for the Plaintiff:—

The points we have now to submit to the Court are, first, that the husband and wife had power to compromise the suit in the Divorce Court. We have the authority of the Master of the Rolls in *Besant* v. *Wood* (1) to shew that a married woman may contract to live apart from her husband, and that the husband may come to the Court to enforce specific performance of such a contract. This is also shewn by *Gibbs* v. *Harding* (2), *Ambler* v. *Bolton* (3), and *Hussey* v. *Horne-Payne* (4). *Vansittart* v. *Vansittart* (5) decides that a wife may contract with her husband to abandon a suit in the Divorce Court, and the Court will not refuse specific performance of such a contract on the mere ground of the absence of a trustee. It is for the wife to appoint a trustee, and the Court will not interfere to prevent her from doing so: *Hope* v. *Hope* (6). *Besant* v. *Wood* is also an authority for contending that a husband may contract to allow his infant children to live with his wife during their separation. But this will not prevent the interference of the Court if it should be for the benefit of the infants subsequently to remove the infants from the wife's custody: *In re Besant* (7); and a deed of separation in which a husband covenants to pay an annuity to his wife during her life will not be invalid even although there may be a dissolution of the marriage on the ground of the subsequent adultery of the wife: *Charlesworth* v. *Holt* (8); *Evans* v. *Carrington* (9).

Secondly, we say that this Court has full power to enforce specific performance of this separation deed, and that in doing so it is not infringing the rules of the *Judicature Act* by interfering with the proceedings of the Divorce Court. One of the terms of the agreement was that the suit in the Divorce Court should be dismissed, and consequently there are no pending proceedings in that Court, but if the action were really pending this would not be an interference with that action, and this is the proper branch of the Court for enforcing specific performance of a deed.

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(1) 12 Ch. D. 605.

(2) Law Rep. 8 Eq. 490; Ibid. 5 Ch. 336.

(3) Law Rep. 14 Eq. 427.

(4) 8 Ch. D. 670.

(5) 4 K. & J. 62. 4 Jur. N.S. 276

(6) Law Rep. 3 P. & M. 226.

(7) 11 Ch. D. 508.

(8) Law Rep. 9 Ex. 38.

(9) 2 D. F. & J. 481. 7 Jur. N.S. 197

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Thirdly, we contend that under the term "usual covenants" the Court will not direct any *dum casta* clause to be inserted. The evidence of the witnesses who are in the habit of preparing deeds of this nature is in our favour, and none of the witnesses can shew that they have ever seen such a clause inserted.

Fourthly, we submit that the clause as to arbitration is not such as to interfere with the jurisdiction of the Court. It is only in case of a difference arising that the two gentlemen named as arbitrators are to have any power of settling the difference: *Baumann* v. *James* (1), *Milnes* v. *Gery* (2), and *Fry* on Specific Performance (3).

KAY, J., referred to *Tillett* v. *Charing Cross Bridge Company* (4) as to the effect of the clause of arbitration.

Higgins, in reply.

KAY, J.:—

I should delay giving judgment in this case, but that it has now extended over some time, and I have had an opportunity of considering the points which have been urged. Some of the questions are of considerable interest and importance. It seems that on the 2nd of May, 1879, a petition was filed by *Henry Hart*, the Defendant in this action, in the Divorce Court against his wife *Louisa Hart*, the Plaintiff in this action, and certain co-respondents, praying for dissolution of the marriage on the ground of the adultery of the present Plaintiff; and to that petition the Plaintiff filed an answer making counter-charges against *Henry Hart*, her husband, and also praying, on the footing, I suppose, of those counter-charges, for a dissolution of the marriage. During the trial, on the 14th of February, 1880, an arrangement was come to, which was reduced into writing and signed by the Defendant, and I understand signed by the Plaintiff also. That arrangement was in these terms: "Petition and answer" (meaning the petition and answer in the Divorce Court) "dismissed; deed of separation with usual covenants; costs of preparing deed to be borne by Mr. *Hart;* Mr. *Hart* to covenant to pay Mrs. *Hart* for herself and child or children £150 a year quarterly; Mrs. *Hart* to maintain the child or children; Mr. *Hart* to pay wife's costs. In case of difference in working out these terms, matter to be referred to Mr. *Willis* and Dr. *Deane;*" Mr. *Willis* being counsel for the husband and Dr. *Deane* counsel for the wife.

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(1) Law Rep. 3 Ch. 508.

(2) 14 Ves. 400.

(3) Page 155.

(4) 26 Beav. 419.

This action was brought on the 25th of October, 1880, in which month the agreement for compromise was entered into, and the Plaintiff asks for specific performance of the agreement, the execution by the Defendant of a proper deed of separation, payment by the Defendant of the annuity and costs, and the costs of this action, and further relief.

To that a statement of defence and counter-claim was put in, the counter-claim having been since struck out by an order of the Master of the Rolls, upon which I have already observed, and I have decided as to one of the pleas in the defence to this action, that I must read it as a plea that the husband signed that agreement with the understanding that the words "deed of separation with usual covenants" would secure the insertion of a clause providing for the validity of the deed only so long as the Plaintiff should continue to lead a chaste life.

Various points have been raised upon this deed, and various points have been insisted upon by way of defence; and first of all it was argued that the Court had no power to interfere with the action in the Divorce Court. I may say, before I consider that point, that there seems to be no kind of doubt, and I have not heard it argued, that the Court has jurisdiction to order specific performance of an agreement for a compromise of this kind. In the case of *Wilson* v. *Wilson* (1) that seems to have been decided in the House of Lords, and in *Besant* v. *Wood* (2) the present Master of the Rolls entirely confirms that view, and I take it to be quite clear that if the agreement was otherwise unobjectionable there is no doubt the Court can specifically perform it.

I will consider the first objection raised—that the Court has no power to interfere with the action of the Divorce Court. If I were asked to grant an injunction restraining a pending action, I

(1) 1 H. L. C. 538.

(2) 12 Ch. D. 605.

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should be prevented by the express terms of the *Judicature Act* of 1873, s. 24, sub-s. 5, which provides: "No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction." It is observable that it refers to a pending action, and I see that the Master of the Rolls in *Besant* v. *Wood* (1) says this: "As regards the injunction, it must be remembered you cannot restrain a pending motion" (I suppose the word "action" was really intended), "but you can restrain a person from instituting proceedings;" and in that case he did grant an injunction to prevent the institution of proceedings by the wife for the purpose of compelling the husband to cohabit with her. Now, am I asked in this case to do anything which in the least degree contravenes the provision of that section of the *Judicature Act?* In the first place, I think it doubtful, after this agreement, which contains the term "petition and answer dismissed," whether there is any pending action in the Divorce Court at all. It may be that the actual dismissal has not taken place, but still, can it be considered, for the purposes of the *Judicature Act*, that it is a pending action? In the second place, whether it is a pending action or not, I am not asked to grant an injunction to restrain it; therefore I certainly am not transgressing the letter of the *Judicature Act* if I grant a decree for specific performance of this agreement, and I do not think I should be in the least degree interfering with the spirit of it, because here is an agreement containing very many other terms which it is important, or may be very important, to the parties to have carried out; and the argument is that, because it contains this one term, that an action which at the time the agreement was come to was pending in the Divorce Court is dismissed, the Court is absolutely by that prevented from directing specific performance of the whole agreement or any part of it.

Just observe what a curious position that would put the Courts in. It is said that the Divorce Court would not entertain jurisdiction as to the question of specific performance, not because it had not jurisdiction, but because the question of specific performance was not one which it necessarily and ordinarily dealt with; and therefore it is preferred that the question should be dealt

(1) 12 Ch. D. 630.

with by another branch of the Supreme Court. Must I not treat this action now before me as if it had come for this purpose before the Divorce Court itself; and would that branch of the Supreme Court, the Divorce Court, have had any difficulty whatever on this portion of the clause, that it had been agreed the action should be dismissed, and would that Court, having otherwise jurisdiction to decree specific performance, have said, by reason of this clause, we must refuse to decree it? It is obvious if it had been in that Court, nothing would have been easier than for the Court to say, the parties have agreed that the action shall be dismissed, and accordingly this Court has ample authority to carry out that part of the agreement. I am not going to direct anything to be done by way of dismissal of the action; I am not going to grant any injunction against the further prosecution of that action. I leave all that to the Divorce Court which has jurisdiction, but I cannot see that I am prevented from making a decree, unless it were essential to the order which I am asked to make, that an injunction should be granted:—I cannot see that that term, that the action is dismissed, being included in this agreement, prevents this branch of the Supreme Court from directing specific performance of the whole agreement. Therefore I overrule that objection.

Then it was argued that there is in this agreement a provision for the custody of the child or children by the wife, and I was referred to the well-known cases of *Hope* v. *Hope* (1) and *Vansittart* v. *Vansittart* (2) for the purpose of shewing that this is a provision for the husband to divest himself of his natural guardianship and custody of the children, and is so much against the policy of the law that it makes the whole agreement either void, or such an agreement as the Court, in its discretion, will not grant specific performance of. That was the case, doubtless, when *Hope* v. *Hope* and *Vansittart* v. *Vansittart* were decided; but they were both decided before the Act of 36 Vict. c. 12, which contains a section which I must consider was enacted on account of those decisions. The second section of that Act provides: "No agreement contained in any separation deed made between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother; provided always that no Court shall enforce any such agreement if the Court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto."

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(1) Law Rep. 3 P. & M. 226.

(2) 4 K. & J. 62. 4 Jur. N.S. 276

Surely the plain ordinary meaning of that clause is unmistakable. The deed is not to be invalid, nor is the particular clause in the deed giving up the custody of the children by the father to be invalid; but it is to be read as if there were inserted in it that this convention as to the custody of the children is subject to the power of the Court, as guardian of the infant children, to enforce or refuse to enforce that, according as the Court may think the interests of the infant children require the enforcement or non-enforcement of that clause. Then, if in a deed of separation a covenant by the father to give the custody of the infant children to the mother is not of itself invalid, how can an agreement for a deed which is to contain such a covenant be invalid either? I think I have failed to thoroughly comprehend the argument upon that point. It seems to me this Act has removed what otherwise might possibly have been a difficulty in carrying out this agreement by an order for specific performance. But I am rather inclined to think that in the deed to be framed under this agreement there probably would not be any provision as to the custody of the children at all. That was said by one of the conveyancing counsel; that he in such a deed, even looking to that provision, would not make any stipulation as to the custody of the children at all. If I understood his view it was this, "I should make the husband covenant for payment of the provision to the wife, for herself or children, either for the maintenance of herself or children, or in order that she might maintain herself and children, or something of that kind, and I should not say a word about the custody of the children." So that I do not think it at all follows that the deed need contain, or would ordinarily contain, any provision of that kind, though I confess my own view in reading this agreement is that it was the intention of the parties that the child or children should live with and be maintained by the mother. It seems to me that is the meaning which must necessarily be attributed to these words, because you cannot conceive that it was intended the mother should maintain the child or children, if the child or children were not living with her, but with the father from whom the provision of £150 a year for the wife was to proceed. I think, however, that the statute to which I have referred removes any difficulty arising from that part of the agreement, even if it be an agreement that the custody of the children is to be with the wife; and accordingly I cannot hold that objection to be one which is at all in the way of making an order for specific performance.

Then I was very much pressed to admit evidence upon the pleading, as I now understand the pleading, that the wife has been guilty of misconduct since the separation, so that the provision to be inserted in the deed as to the annuity would now, according to the intention and meaning of this agreement, have come to an end; and therefore that I am not to decree specific performance. Again I say, having paid the utmost attention to the argument, I am not able to comprehend it. How can it follow, if it were the case, that because one provision of a deed of this kind, by the terms of its limitation, has come to an end, that therefore there is not to be a deed at all. Supposing that particular provision had come to an end, there are various other provisions contained in the separation deed which would not have come to an end. There is the covenant by the trustee with the husband that the wife shall not molest or interfere with him; there is his covenant that he will not molest or interfere with the wife, but will allow her to live separately. There is a covenant by the trustee to indemnify the husband against the wife's debts. I need not go further. Those are provisions which would be operative, even supposing that the annuity for the wife had come to an end by the terms of the limitation of that annuity. Therefore I am not able to follow the argument that I should not decree a deed to be executed, or this agreement to be carried out, because one term—one essential term, if you like—has by the very form and stipulations of the agreement come naturally to an end, if it has come to an end. Therefore, so far as that can be urged as a reason why the Court should not make an order for specific performance, I must hold that it fails as such a reason, and it was on that ground, because it seems to me that the reason is entirely irrelevant to the question whether the Court can grant specific performance or not, that I did not allow evidence to be gone into, in order to prove that the wife had been guilty of misconduct. By anything I have said, of course, I do not assume that she has, the least in the world; I am only dealing with the argument that proceeded on the assumption that she might have done so.

Now there remain three other objections which were pressed thus by Mr. *Higgins*, if I rightly understood his argument. He said that the agreement was too vague; he said that there was no mutuality in it because no trustee had been provided, and then he relied very much indeed on that clause at the end of it, "that in case of difficulty in working out these terms the matter is to be referred to Mr. *Willis* and Dr. *Deane*." I do not understand that it can be fairly said that this agreement is too vague in any other respect except about the arbitration, and the fact that the trustee is not named. But I cannot omit to observe that the action for specific performance is brought by the wife, whose duty it is to provide a proper trustee, to enter into the usual covenants which a trustee in a separation deed does enter into with the husband—that the trustee in fact in all cases is found by the wife, of course subject to his being a proper person, and all that is a matter of detail to be arranged in carrying out this deed. But I do not see, having got the words "usual covenants," that there is any such vagueness on that point as ought to induce me to refuse to interfere on that ground. It seems to me that when two parties—the husband and wife—agree to compromise a pending litigation upon the terms that a deed of separation shall be executed containing the "usual covenants," those very words imply, if they do not express it, that there will be a trustee on behalf of the wife, who will enter into such covenants as in such a deed a trustee usually enters into on behalf of the wife with the husband. Therefore, I think there is no such vagueness on that point as should induce me to refuse to give relief.

Then comes that part of the argument which has impressed me more than any other part—that is, with reference to the two gentlemen named in this agreement who are to settle any difference that may arise. I must observe, before I deal with that question,

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that this is an agreement, one essential part of which has to some extent been performed. It was an agreement at the hearing of an active litigation between husband and wife, and it is perfectly well settled that husband and wife, being at arm's length in a divorce suit, are perfectly competent to enter into a binding agreement; and whatever may be said about other considerations, I for my part regard the main consideration of such an agreement to be the compromise of a litigation, the putting an end to an action which, whenever it arises, is a scandalous and shocking thing, which husband and wife, whatever their grievances may be, may each of them think is a very proper thing to put an end to, by making considerable sacrifices on one side and on the other. I cannot conceive any point of law and common sense of higher consideration than that.

Now, as to that point, there has been a performance of the agreement from the 14th day of February, 1880, down to this moment, because from that time to this no further proceedings have been taken in the divorce action. And I feel considerably impressed by the consideration which actuated the Court in *Milnes* v. *Gery* (1), and was expressed in very emphatic language by Lord Justice *Turner* in *Wilson* v. *West Hartlepool Railway Company* (2), that when an agreement for valuable consideration between two parties has been partially performed, the Court ought to do its utmost to carry out that agreement by a decree for specific performance. I think, if I do not misquote the words, Lord Justice *Turner* went as far as this: It is the duty of the Court, as far as it is possible to do so, to ascertain the terms of the agreement, and to give effect to it. That is, as I understand, the rule of equity, that although there may be considerable vagueness in the terms, and although it may be such an agreement as the Court would hesitate to decree specific performance of, if there had not been part performance, yet when there has been part performance the Court is bound to struggle against the difficulty arising from the vagueness. Without putting the rule higher than that, I have to consider whether there is in this last objection of the arbitrators being named in the agreement to settle any difference that may arise, such a formidable difficulty as the Court, after all, must give way to and cannot get over. I mentioned during the arguments the case of *Tillett* v. *Charing Cross Bridge Company* (1), which I have always thought was one of the strongest decisions on that point to be found in the books. No stronger decision has been cited to me, and, in such opportunity as I have had, I have looked back to those cases which were also familiar, and I cannot find a stronger decision. *Tillett* v. *Charing Cross Bridge Company* was a case of this kind. It was an agreement made by the *Charing Cross Bridge Company* on the one part, and Messrs. *Tillett* on the other part,—"The company to pay to Messrs. *Tillett* the sum of £5500, which entitles them to pull down, for the purpose of making the street shewn by the white strip on the plan, the houses or buildings indicated by the following numbers," and so on. "The old materials of the houses so to be pulled down to be the company's. The company to convey to Messrs. *Tillett* the freehold of the ground shewn on the plan by a red colour. Messrs. *Tillett* to continue liable for the full rent now payable by them to the Archbishop, without any deduction or apportionment in respect of this transaction. As to the houses which Messrs. *Tillett* may build on the frontage of the new street, it is understood that both the company and themselves are greatly and mutually interested in the character of the street, as a respectable and attractive public thoroughfare, and the company is to be consulted on any houses proposed by Messrs. *Tillett*, and in case of difference between the parties on this point Messrs. *Charles Lee* and *Richard Withall*, or their nominee, shall have power absolutely to define and decide any such question." Now, that being considered by the Court an essential term of the memorandum, there was no concluded contract as to that term. It was not to build "usual houses" and in case of difference *A. B.* to be consulted, but it was to build such houses as the company and Messrs. *Tillett* should mutually agree upon. So that there was no agreement as to what kind of houses were to be built, and as to that, therefore, there was no contract, but the contemplation of a future contract; and that seems to me the material difference between the case of *Tillett* v. *Charing Cross Bridge Company* and this case, because in this case it will be

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(1) 14 Ves. 400.

(2) 2 D. J. & S. 475. 10 Jur N.S. 1064

(1) 26 Beav. 419.

observed that there was to be a deed of separation with "usual covenants;" not with such covenants as the two parties shall hereafter agree upon, but with usual covenants; and "usual" means usual according to the practice and custom of conveyancers in such cases. All that was to be left to Mr. *Willis* and Dr. *Deane* was this—not to complete any part of this agreement which was left incomplete—but in case of difference in working out these terms, the matter in difference was to be referred to Mr. *Willis* and Dr. *Deane*.

Before I examine the cases which I am going to refer to I wish to point this out distinctly, that it seems to me the Court is not at liberty to suppose there will be a difference. There may not be any difference at all in an agreement like this; there may be nothing to refer to Mr. *Willis* and Dr. *Deane*; and certainly it would be an absurd thing, a very inconvenient and I think I may say a very wrong thing, that the Court should hold its hand after an agreement has been partly performed in its main stipulation, because it assumes that there may arise a difference which may have to be referred to two named arbitrators. Now I do not think that *Tillett* v. *Charing Cross Bridge Company* (1) is an authority for saying that the Court ought to refuse specific performance, because of an objection of that kind. But the decision in *Tillett* v. *Charing Cross Bridge Company* purported to proceed on cases very well known to all of us; first of all the case of *Gregory* v. *Mighell* (2), which is this: A parol agreement for a lease of twenty-one years, on the payment of a just rent, to be ascertained and fixed by two indifferent persons; one to be chosen by the Plaintiff, the other by the Defendant, with liberty to the arbitrators, in case of difference, to choose one or more umpires. In that case specific performance was decreed, and it was decreed upon the ground which I have already indicated as being a very strong ground in this case, that there had been part performance by possession being taken. But there one of the essential things, namely, the amount of rent, without fixing which it was impossible to say there was a concluded agreement at all, was to be fixed by arbitrators to be named by either party, yet

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(1) 26 Beav. 419. 5 Jur. N.S. 995 (2) 18 Ves. 328.

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the Court in a case of part performance did not think the difficulty an insurmountable one, and decreed specific performance.

In the case of *Milnes* v. *Gery* (1), the agreement was for sale according to the valuation of two persons, one to be chosen by each side, or an umpire appointed by the two in case of disagreement. They differed in their estimate, and were not able to agree upon a third person, and in that case it was decided that the agreement could not be specifically performed. The ground is put thus by Sir *William Grant* in giving his judgment: "The only agreement into which the defendant entered was to purchase at a price to be ascertained in a specific mode. No price having ever been fixed in that mode, the parties have not agreed upon any price. Where then is the complete and concluded contract which the Court is called upon to execute?" Surely you may put the reason of that decision briefly thus:—The contract which the Court is called upon to execute is not a complete contract; but it is an agreement that a contract should be made. The Court cannot enforce an agreement that a contract should be made; the contract must be complete. Reference is also made to the case of *Darbey* v. *Whitaker* (2), which is essentially the same as *Milnes* v. *Gery*. Those were the decisions upon which the case of *Tillett* v. *Charing Cross Bridge Company* (3) proceeded. Therefore, I have no doubt that the meaning of that decision was this: that under the particular terms of that contract there was not a complete and concluded agreement, but it was essential, in order to complete and conclude the agreement, that a further agreement between the company and Messrs. *Tillett*, or failing them, the arbitration of the named persons, should have taken place; and until that was done, there was nothing which the Court could enforce, that being the essential term of the agreement. That is entirely consistent with the case of *Scott* v. *Avery* in the House of Lords (4). The facts were these: "*A.* effected in a mutual insurance company a policy of insurance on a ship, one of the conditions of which was that the sums to be paid to any insurer for loss should in the first instance be ascertained by the com-

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(1) 14 Ves. 400.
(2) 4 Drew. 134.
(3) 26 Beav. 419. 5 Jur 199
(4) 5 H. L. C. 811. 7 Jur 28
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mittee; but if a difference should arise between the insurer and the committee, relative to the settling of any loss, or to a claim for average, . . . that was to be referred to arbitration in a way pointed out in the conditions: provided that no insurer who refuses to accept the amount settled by the committee shall be entitled to maintain any action at law or suit in equity on his policy, until the matter has been decided by the arbitrators, and then only for such sum as the arbitators shall award." The obtaining of the decision of the arbitrator was declared to be a condition precedent to the maintaining of an action. It is quite clear, according to the terms of the contract, that as no action could be brought except for such a sum as the insurer was entitled to under the award, until the sum was settled there was no cause of action whatever.

That case was followed in *Scott* v. *Corporation of Liverpool* (1), where the surveyor was to determine the amount payable, and until he had made that determination there was no sum which could be sued for.

All these cases seem to me to proceed on one and the same principle—a very simple and intelligible principle—that where the agreement on the face of it is incomplete until something else has been done, whether by further agreement between the parties, or by the decision of an arbitrator, this Court is powerless, because there is no complete agreement to enforce.

Applying that rule to this case, I find here an agreement which, on the face of it, is quite complete; the arbitrators are not to complete this agreement, they are not to supplement any defect in it; that is not the purpose for which they are appointed; but the thing they are appointed to do is merely this, that in case of difference in working out these terms the matter is to be referred to them; and now I refer to the case of *Gourlay* v. *Duke of Somerset* (2), in which the agreement was for a lease which was to contain all such provisions as shall be judged reasonable and proper by *John Gale*. That case is very like *Tillett* v. *Charing Cross Bridge Company* (3), but it differs from this, because, as I have already pointed out, this is not an agreement that the deed is to contain such cove-

(1) 3 De G. & J. 334. 5 Jur NS 166

(2) 19 Ves. 429.

(3) 26 Beav. 419. 5 Jur NS. 994

nants as Mr. *Willis* and Dr. *Deane* agree upon; but even in that case, there having been a suit for specific performance, a decree had been made, and on the reference to settle the lease a question arose, the suit having been by the intended lessee against the lessor. On the reference to settle the lease, which was to be made by the defendant to the plaintiff, the defendant contended that the Court would determine what were the proper covenants to be put in, and take the matter out of the hands of *John Gale*, the referee, and the question arose whether the Court would do that or not. The Master of the Rolls decided that, the plaintiff in the action having obtained a decree for specific performance, the objection did not lie in his mouth, because in point of fact he had waived it by obtaining the decree, and submitting to the jurisdiction of the Court; and the Judge certainly said this (1): "If the defendant insisted that the only lease he was bound to execute was one to be approved by *Gale*, and not by the Court, there would be more colour for the objection." That is, as I understand it, if at the hearing of the action the defendant had said, there is no complete agreement, because I have only agreed to execute a lease containing such covenants as *Gale* shall approve, and *Gale* has not approved a lease, then it seems to me the Court would have been in great difficulty, and would probably have refused to decree specific performance; but the Court said, the plaintiff having obtained a decree for specific performance, the objection that *Gale* was to settle the lease did not lie in his mouth, and he must be held to have waived that objection; and the Court went on to say this, "Suppose the reference made to *Gale*; is his decision liable to exception? If it is, the decision with regard to the propriety of the lease will ultimately be that of the Court, if not, the Court may be carrying into execution a lease which it may think extremely unreasonable and improper. If the parties had gone to *Gale* and got him to settle a lease, and one of them had objected to the covenants as improper, and the bill had been filed by the other, the Court would have inspected the lease and, if it were found unreasonable, would not have decreed an execution of the agreement." I do not know whether I ought to read that as meaning if the defendant had raised this objection to specific performance, still the Court would have to consider the actual terms of this lease; it may, in the long run, come to be settled by the Court, and, therefore, we will disregard that portion of the convention of the parties which makes *John Gale* the person to settle the terms of the lease. I am not sure whether that is the meaning of the Master of the Rolls. Therefore I rather hesitate to accept the short statement of that decision which is contained in the recent edition of Mr. Justice *Fry's* book (1), where the decision is said to be this: "In this case there was a contract to grant a lease to contain such conditions as *A. B.* should think reasonable and proper, and His Honour referred it to the Master to settle the lease and not to *A. B.*, considering the agency of *A. B.* not to be of the essence of the contract, and that the Court would not grant relief through the medium of a reference compulsory on the other party." I confess I rather hesitate to hold that to be the effect of that decision. But that case, as I have pointed out, even if I am to suppose that the Master of the Rolls means that if the defendant had made this an objection to a decree for specific performance he might have been compelled to yield to the objection, still does not govern this in the least degree, because there the defendant's objection would be, I only agreed to grant such lease as *Gale* should approve. That is not this case. In this case the deed is not to be such a deed as Dr. *Deane* and Mr. *Willis* approve, but to be a deed containing "usual covenants," and the agreement is quite perfect and complete in itself without the clause of arbitration. The clause of arbitration is only added as a subsidiary clause in case a difference should arise, which, as I have already said, I cannot and ought not to contemplate as a thing which must inevitably happen. But whether it happens or not, I do not think that the case comes within *Tillett* v. *Charing Cross Bridge Company* (2) or any other of the cases cited on this point, and I do not know of any authority for refusing to grant specific performance of an agreement like this, because of the addition of that clause that in case of difference the difference is to be decided by two named persons; and least of all do I consider that the Court is bound to hold its hand on that ground in a case where, as here, there has been part performance of what I consider to be one of the most important stipulations in this agreement.

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(1) 19 Ves. 432.

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(1) Page 155.

(2) 26 Beav. 419. 5 Jur. N. S. 974

Therefore all these grounds, which I believe were the only grounds urged as a reason why the Court should not make a decree for specific performance, seem to me to fail, and I feel myself bound to make a decree in this case for specific performance of this contract.

There then remains the question which has been submitted to me, as I must take it, by agreement between the parties, that is, whether or not a particular provision that an annuity to be paid to the wife should last only so long as she leads a chaste life is to be included in this deed under the words "usual covenants."

On that point, first of all, I look with my own eyes, without extraneous help, at this agreement, and I find in it a provision "Mr. *Hart* to covenant to pay Mrs. *Hart* for herself, her child or children, £150 a year quarterly." I find in that no such limitation, I should rather say, no such defeasance, and the natural place for such defeasance to occur, if it were intended, would be in that clause, or connected with that clause. Then comes the question whether, as it is not expressed in any way, it is to be implied by reason of the words "usual covenants," and I believe I am not misrepresenting the argument when I say it was put to me in this way, that the surrounding circumstances at the time the agreement was entered into are to be considered, and one very important circumstance is this, that the agreement was entered into in the course of the trial of an action in which certain evidence had been given to criminate the wife—to prove that she had been guilty of adultery. The evidence on the other side had not been put in, but at that stage of the proceedings this agreement was come to, and the Court in determining what are "usual covenants" must look to that among other facts, and "usual" must mean usual under such circumstances. I admit that argument to a certain extent. I do think that "usual" is in many cases to be read with reference to the surrounding circumstances, and I agree that here the Court must not shut its eyes, or blindfold itself, but must try to put itself, in order to understand this agreement, in the position, as near as it can, of the parties making the agreement. That is the rule, as I understand, on the construction of every deed or document, whether it be an agreement, a deed, or a will; the Court has a right to know, and is bound to know, all the material facts which were known to the parties at the time when the agreement, deed, will, or whatever it may be, was entered into or made. That is legitimate in all cases for the purpose of construing a written instrument. I put myself in that position as far as I can, but I dissent entirely from the statement that I am bound to consider the evidence given on one side of a particular fact, which evidence had not been answered, and that I am to treat that as being a material circumstance in considering this agreement. How can I tell that the evidence on the other side might not have disproved it entirely? Evidence is not proof, least of all can evidence given on one side in a contested litigation, be proof of the fact for maintaining which that evidence is adduced. I do not know what effect that evidence which was given produced on the mind of the Judge who was trying the case and who was in that respect a jury. I do not even know what the evidence was. I cannot know, and therefore, in construing this deed, I do not look upon the fact that such evidence had been given upon one side only, as being a material circumstance to be regarded.

Then it is said the pleadings and the charges made in the pleadings should be regarded, and the issue should be looked to. I will not say that that may not, in some cases, be material, but is it material here? Suppose I look at the pleadings. I have not done so, so little has it been thought material, that they have not even been put into my hands, nor have counsel thought it worth while to refer to them in the argument in this case. I suppose I should find an accusation made against the wife, met probably by a denial—I do not know, I assume that for a moment—and a counter-charge in the wife's counter-claim against the husband. How can I alter the meaning of the words "usual covenants," because there were those charges and counter-charges? I find myself perfectly unable to treat that, supposing it to be relevant, as evidence which can affect the meaning of the words "usual covenants." Then the two gentlemen engaged as counsel in this action were put into the box, and their evidence seems to me to come to this. Of course it was sought to induce me to accept evidence of what the negotiation was, but holding, as I do, that a written agreement has been come to which is complete in its terms and as to which the pleading is simply that the Defendant signed it perfectly knowing what the words were, and putting a certain meaning of his own upon them, I have held that under those circumstances evidence to shew that there was another agreement or any omitted terms, is not competent to the Defendant. All I have to consider is, what is the meaning in this agreement of the words "usual covenants." Therefore I declined to receive evidence from these gentlemen of what the negotiation leading up to this agreement was. The evidence given by these gentlemen was of this nature. Dr. *Deane* said he was leading counsel in *Hart* v. *Hart* for the wife, who was the Respondent in that action in the Divorce Court, while Mr. *Willis* was counsel for the husband, and they negotiated terms of arrangement. Dr. *Deane* says: "As to the chastity clause I cannot answer as to its being usual, except that if I were counsel for the husband I should insist upon it." I must take that to mean only this, If I were negotiating terms of this kind, acting on behalf of the husband, I should insist that there should be put into the agreement that the annuity to the wife should cease if she became unchaste. That is as clear to my mind as any evidence could possibly be, that Dr. *Deane's* opinion was, that it was not a usual covenant, but a thing which ought to be stipulated for. Mr. *Willis*, on the other hand, says that he believes it to be the invariable practice in the Divorce Court where an allowance is ordered—that is by way of alimony, I understand, in favour of a guilty wife—to make it part of the order that it shall continue only so long as she continues chaste, and that when in course of litigation parties come to an arrangement wherein it is alleged that the wife has been guilty of adultery, and a provision is to be made for her by deed "with all usual covenants," such words would be taken to mean and include the *dum casta* clause. The term "usual covenants" means, he says, usual under all the circumstances, and it is distinguishable from a case of agreement out of Court when the wife is not guilty. That asks me to assume the very thing which was in issue in that case, whether the wife was guilty or not, and it seems to me quite impossible for me to assume that the wife was a guilty person, for the purpose of having

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that provision introduced into the deed which would be introduced into the order of the Court in granting alimony, if the Court was satisfied that the wife was guilty, because what Mr. *Willis* says is, that the Court puts that in its order where it is satisfied the wife is guilty, but it does not follow that the Court would put that clause in its order, where the wife was accused of being guilty and the guilt was not proved. Therefore I do not think the evidence on the part of the husband as to this being a usual covenant is very satisfactory or convincing, and I should hesitate to decide that this was a usual covenant, looking to all the facts which I am at liberty to regard, even upon the husband's evidence alone. Then of course I could not decide this upon the husband's evidence alone. We have had gentlemen known to all of us—gentlemen of great experience—put into the witness box on behalf of the wife, who have all told me that the words "usual covenants" certainly would not include a clause of this kind. I have already observed that it is not strictly a covenant at all. The only book in which such a provision occurs is a book handed up to me by counsel for the husband, in a late edition of which, in the covenants to make a provision of this kind for the wife, there is introduced by way of proviso this limitation, and I take it that would be according to all conveyancing practice the proper mode of introducing it, or perhaps it would be more proper if it were introduced in the covenant to pay the annuity to the wife in this form:—A covenant to pay the annuity to the wife during their joint lives, or so long as the wife remains chaste; that, as it seems to me, would be the more strict way of introducing the provision. That, however, is almost a verbal criticism, because, if usual, it would probably come into the covenant in some form, either by way of proviso or limitation in the extent of the covenant, and, therefore, in that sense it may be treated as part of a usual covenant. As I said, the views of these gentlemen, experienced conveyancers, coincide. All of them say that they should not think—they being persons who cannot have any bias in the matter one way or the other, having no connection with the case at all, merely coming here to prove what is the practice of conveyancers—all of them say they should not think of introducing a provision of this kind unless specially instructed so to do. Therefore

I, having this point submitted to me to decide—although it might, perhaps, have been the duty of Mr. *Willis* and Dr. *Deane* to decide it in the first instance if it had not been submitted to me—must decide it in favour of the wife. I think in an agreement of this kind this limitation of the provision for the wife must be specially expressed if it is intended to be contracted for, and that the words "usual covenants" do not include it.

Now I believe that determines everything which has been submitted to me, except this. According to the view which I have taken of this case, this question as to what would be "usual covenants," supposing it had been submitted to Dr. *Deane* and Mr. *Willis*, and they could not have agreed, probably would have had to come before the Court, as Sir *William Grant* said in *Gourlay* v. *Duke of Somerset* (1); therefore I have the less hesitation in undertaking to decide that question to the best of my ability now.

I think the decree I am bound to make is the usual decree for specific performance of this agreement, and I think I ought to add to that decree a direction that the deed is to be settled in Chambers if the parties differ. I do so for this reason, if the parties intend to carry this case further it is better that my view should be very clearly expressed on the matter, and my view is, that this provision for the settlement of differences, in case they arise, by Dr. *Deane* and Mr. *Willis*, does not oust the jurisdiction of the Court to settle the deed itself; that the agreement is on the face of it complete, and this is an incidental term introduced, which does not in fact oust the jurisdiction of the Court. I confess I do not know such a decree, but I do not know why, if this comes within the provision of the *Common Law Procedure Act*, a decree might not be made in the terms of merely directing specific performance of the agreement, and then leaving any difference to be settled by Dr. *Deane* and Mr. *Willis*, with a reference to the Court in case they cannot agree, or with power for the Court to exercise those provisions of the *Common Law Procedure Act* which would enable it to make the arbitration effective. I do not know any such decree, and I should not like to be the first Judge to make one in that form. I therefore think it better to make a decree in the form I have indicated; then if the case should go further the whole of the decree will be subject to revision, and the extent to which I have proceeded will be thoroughly understood from the terms of my judgment, and of the decree. There remains the question of costs.

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(1) 1 V. & B. 68.

Higgins, Q.C.:—

I would suggest that your Lordship cannot deal with the costs until it shall appear whether the Plaintiff performs her part of the agreement and provides a trustee. If it should turn out that the Plaintiff fails in this respect the result will be that no benefit will arise from this action either to herself or anybody else.

KAY, J.:—

That will not make the defence any better. I must give the wife her costs of this action up to and including the hearing. There must also be liberty to apply, so that the question of subsequent costs can then be dealt with. The costs of the divorce suit will be included in the order for specific performance of the agreement, which provides for the costs. There will be a declaration to the effect that the usual covenants do not include the *dum casta* clause, and there must be an order for payment of the arrears of the annuity, taking credit for the amount of alimony which may have been paid pending the litigation, the amount to be stated in the order.

Solicitors for Plaintiff: *Meredith & Co.*
Solicitors for Defendant: *Darley & Cumberland.*

T. W. G.

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June 24, 30; July 4.

PAWSEY v. ARMSTRONG.

[1881 P. 50.]

Partnership—Profit and Loss—Legal Effects of Contract—Dissolution—Sale of Assets and Goodwill.

The Plaintiff, having been a clerk in the Defendant's firm, entered into a verbal agreement with him for a share of profit and loss in the proportion of one-fifth to the Plaintiff and four-fifths to the Defendant, it being stipulated that the building in which the business was carried on should remain the property of the Defendant. The Plaintiff alleged that the agreement was for a partnership, and claimed a dissolution and an account of assets. The Defendant denied the partnership, and alleged that the Plaintiff was only manager:—

Held, that the agreement for sharing profit and loss in certain proportions conferred all the rights of partnership *inter se*, subject to the stipulation as to the buildings remaining the property of one partner; that the Defendant could not maintain that the legal effects of partnership should not follow such a contract, and that the Plaintiff had a right to a dissolution and sale of the assets of the partnership, including the goodwill: such sale to be conducted by an independent firm of solicitors, with power to either partner to bid.

THE Plaintiff, *Arthur Pawsey*, stated that in the year 1861 he entered into the service of the firm of *Nicholay, Graham, & Armstrong* as a salaried clerk, and continued in their service till the month of December, 1868, when the partnership was dissolved and the business was taken over by the Defendant, *George Armstrong*. The Defendant afterwards offered to take the Plaintiff into partnership in the business. The Plaintiff accepted the offer, and in February, 1869, the Plaintiff paid £210 in cash as capital to the credit of the firm, which was carried on under the style of *George Armstrong & Co.* The terms of the partnership were not finally settled till the month of June, 1869, when it was agreed between the Plaintiff and the Defendant that the partnership should continue for the term of five years as from the 30th of June, 1869, and that from that date one-fifth share of the profits of the business should be received by the Plaintiff, and that he should bear one-fifth of the losses thereof. It was also part of the agreement that the Plaintiff should manage and superintend the manufacturing part of the business and the disposal of the oilcake manufactured at the mills. The Defendant also stipulated, and it was agreed, that the mills whereat the business was carried on (which were held upon a lease of sixty years, originally granted to *Nicholay, Graham, & Armstrong*) should be and remain the sole property of the Defendant. No written agreement was ever executed respecting the partnership. For the first half-year, while the affairs of the old firm were being wound up, the Plaintiff received his former salary and a bonus of £100, but from that date until June, 1873, the books of the firm debited the Plaintiff with one-fifth of the losses and credited him with one-fifth of the profits appearing upon each half-year's accounts, and the capital from time to time brought into the business by the Plaintiff was duly credited to him in the said books on his capital account in the same manner as the Defendant's capital was credited to him. In the month of April, 1871, the Plaintiff brought in further capital to the amount of £1500, which was credited to his capital account in the books. In March, 1871, the firm obtained in the name of the Defendant a lease of a wharf and land adjoining the mills, and buildings were erected and works carried out upon the land and wharf for the purposes of the business. The cost of such works, which was defrayed out of the moneys of the partnership, was about £1500.

In June, 1873, a fresh arrangement was come to between the Plaintiff and Defendant, when it was agreed that from that time the Plaintiff should bear one-fourth of the losses and receive one-fourth of the profits, and it was also agreed that the partnership should be carried on in other respects on the same terms as before, for five years succeeding the 30th of June, 1873. The new agreement was not put into writing, but had been acted upon down to the commencement of this action.

The Plaintiff then stated that from the commencement of the partnership he had, with the full knowledge of the Defendant, been in the habit of signing the name of the firm to all letters, contracts, delivery orders, and other documents in the course of the business, and of making contracts and indorsing cheques, drawing and indorsing bills of exchange, and making proofs in bankruptcies and liquidations on behalf of and in the name of the firm, but early in the year 1878 the Defendant desired the Plaintiff to let all bills of exchange to be drawn and indorsed by the firm come to him, the Defendant, for signature or indorsement, and this the Plaintiff agreed to. Large sums out of the partnership moneys had from time to time been laid out for the necessary purposes of the partnership upon the premises comprised in the lease of 1871, and also on the mills and premises belonging to the Defendant. On the 24th of December, 1880, the Defendant informed the Plaintiff that he wished the Plaintiff to discontinue using the signature of the firm, but this the Plaintiff declined to do, and wrote a letter to the Defendant insisting that he was a partner. The Defendant did not reply to this letter, but on the 5th of January, 1881, inserted an advertisement in a newspaper stating that the Defendant would not be liable for contracts entered into by the Plaintiff in the name of *George Armstrong & Co.* It was necessary under these circumstances that the partnership should be dissolved, and the Plaintiff claimed a declaration that he was at the commencement of this action, and had been ever since the 30th of June, 1869, a partner in the firm, and that he was entitled to have his rights as such partner determined; to have the partnership dissolved as from the 6th of January, 1881, the day on which the action was commenced, and that an account should be taken of all dealings and transactions between the Plaintiff and Defendant as co-partners, and an inquiry of what the credits, property, and effects now belonging to the partnership consisted, and how the same might be sold most beneficially, and whether as a going concern or as one finally wound up, and to have the same sold accordingly; and also a declaration that the mills and leasehold premises belonging to the Defendant were subject to a charge in favour of the partnership for all moneys of the partnership laid out thereon for the purposes of the partnership business, with interest at £5 per cent. from the time of the same being laid out, and, if necessary, that the premises subject thereto should be sold; and that a receiver and manager should be appointed of the partnership concern and the assets thereof.

The Defendant, by his answer, denied that any partnership existed between him and the Plaintiff, and alleged that the Plaintiff was appointed by him to be general manager of his business; that in lieu of paying the Plaintiff a fixed salary he agreed to allow him a fifth of the profits of the business, and that the Plaintiff should bear one-fifth of any loss to be sustained by the business. At the time this agreement was entered into the Defendant expressly stipulated that this mode of remuneration should not be construed as in any way admitting the Plaintiff into partnership with the Defendant, or giving the Plaintiff any rights in the firm of *George Armstrong & Co.*, and this was agreed to by the Plaintiff. The Defendant denied that any capital was ever brought into the firm by the Plaintiff, or that any capital account was ever opened in the Plaintiff's name in the books of the firm; that the two sums of £210 and £1500 alleged by the Plaintiff to have been brought in as capital by the Plaintiff were in fact deposited with the Defendant and paid into his bankers to the credit of his account kept there in the name of *G. Armstrong & Co.*, and the Defendant had agreed to allow the Plaintiff interest on such sums at the rate of £5 per cent. per annum, and that no money was ever credited in the books of the firm to the capital account of the Plaintiff; that in March, 1871, a lease was granted to the Defendant in his own name of a wharf and land adjoining the mills where the business was carried on. Upon this land buildings were erected and works carried out for the purpose of the Defendant's business at an expense of £1004, which was defrayed out of moneys standing to the credit of *George Armstrong & Co.* at the Defendant's bankers, and not out of any partnership moneys. The Defendant further stated that the various documents signed by the Plaintiff in connection with the business were signed by him as general manager, and on behalf of the Defendant's firm, in the customary manner, and not as a partner in the firm. The Defendant alleged that the Plaintiff was not, in respect of any interest in the business of *G. Armstrong & Co.*, entitled to any charge upon the leasehold premises belonging to the Defendant for any sums expended thereon; that the Defendant was ready and willing to pay to the Plaintiff such a sum of money as the Court should consider the Plaintiff entitled to, but he denied that the Plaintiff was entitled to any of the relief claimed by him in this action.

Witnesses were examined on both sides in support of the different contentions.

Rigby, Q.C., and *Northmore Lawrence*, for the Plaintiff:—

Our claim rests upon there being a partnership constituted by the agreement of June, 1869. It is admitted that the Plaintiff was to have a certain share in profit and loss, and that is sufficient to make it a partnership. The case of *Syers* v. *Syers* (1) is exactly in point, where it was held that a partnership was constituted by an undertaking to execute a deed of co-partnership for one-eighth share of the profits in an undertaking. It was there contended that it was only to be a co-partnership in profits, but the Lord Chancellor said, " A co-partnership in profits, as we all know, is a co-partnership in those assets by which the profits are made and produced," and there it was held that there must be either a sale of the undertaking as a going concern or a proposal for a purchase, and, under the circumstances, the latter course was adopted. Then, in *Greenham* v. *Gray* (2), it was decided that an agreement to share profits, nothing being said about loss, meant *primâ facie* an agreement to share loss also, and a partnership was constituted although the mills, machinery, and buildings, by means of which the business was carried on, belonged to one partner only. It was also laid down as a rule of law in *Pooley* v. *Driver* (3), that, in the absence of something in the contract to shew a contrary intention, the right to share profits constitutes a partnership. In this case there can be no doubt whatever about it, since the agreement was distinctly to share profit and loss, and that has always been held to constitute a partnership. The Plaintiff admits that the mills in which the business was carried on belong to the Defendant, but he claims to be entitled to a share in the buildings erected upon the land, subsequently taken upon lease by the Defendant, because part of his money which he brought into the partnership was expended on the buildings erected thereon.

Higgins, Q.C., and *Hornell*, for the Defendant:—

In this case no arbitrary presumption of law can be laid down, because what we are dealing with is the intention of the parties. If you couple the word partnership with a contract shewing that

(1) 1 App. Cas. 174.
(2) 4 Ir. Com. L. Rep. 501.
(3) 5 Ch. D. 458.

it was not intended to have a complete partnership, then you may prove what was the intention existing between the parties. Two persons may, if they choose, contract between themselves that there shall be a limited partnership only. It was held, in *Mollwo, March, & Co.* v. *Court of Wards* (1), that participation in the net profits of a business was not sufficient to establish a partnership, and that whether the relation of partnership does or does not exist depends on the real intention and contract of the parties.

In this case the Plaintiff was a paid clerk in the firm, and he was taken into the business, on the dissolution of the old firm, as a quasi-partner, with a certain share in the profits of the business by way of remuneration, and this brings the case within the statute 28 & 29 Vict. c. 86, s. 2, which provides that no contract for the remuneration of a servant or agent of a trader by a share of the profits shall render such servant or agent responsible as a partner, nor give him the rights of a partner. As to the money paid into the concern by the Plaintiff, that was advanced by way of loan, and the 1st section of the Act provides that the advance of money by way of loan to a person engaged in business upon a contract that the lender shall receive a portion of the profits, shall not constitute a partnership, but, independently of that Act, no partnership exists between partners paid and those who pay them where a partnership was not intended.

We submit that the evidence shews that a partnership was not intended, because, in addition to the fact that the mills and buildings belonged to the Defendant, there was a submission on the part of the Plaintiff to the signature by the Defendant of all bills of exchange. This fact shews distinctly that the Plaintiff never considered himself in the light of a partner, with the same rights and powers as the Defendant.

[They referred to *Lindley* on Partnership (2).]

KAY, J.:—

In this case *Arthur Pawsey* has brought an action stating that in the year 1861 he entered into the service of the firm of *Nicholay, Graham, & Armstrong*, as a salaried clerk, and con-

(1) Law Rep. 4 P. C. 419.

(2) 4th Ed. pp. 2, 19.

tinued in that service until the dissolution of the firm; that in the year 1868 the partnership was dissolved and the business taken over by *George Armstrong*, the Defendant, and that on that dissolution the Plaintiff told the Defendant that an offer had been made to him by a person named *Haddock* to commence an independent business in partnership with the Plaintiff; that the Defendant thereupon requested the Plaintiff to continue with him, and agreed that if the Plaintiff would do so he should be taken into partnership with the Defendant in that business, which offer the Plaintiff accepted, and that they then became partners originally in the proportion of four-fifths to *Armstrong* and one to *Pawsey*, and then, later on, in the proportion of three-fourths to *Armstrong* and one-fourth to *Pawsey*.

There has been considerable evidence put in on the one side and on the other which I do not intend to examine at all closely. This is admitted: It is the common case of both that the share that *Pawsey* was to have,—at first one-fifth and afterwards one-fourth,—was a share in the profit and loss of the business, and I have asked for any authority to shew that where two persons agree to divide the profit and loss of a business in certain defined shares that they have been held not to be partners. Mr. *Pawsey's* case here is, that it was agreed that he was to be a partner on these terms. Mr. *Armstrong* says, "I did not agree that he should become a partner; on the contrary, I would not agree to his being a partner, but I did agree that he should share with me profit and loss." Now, I confess, in my opinion, the agreement to share profit and loss is quite conclusive of the relation between two persons who do so agree, and it is not possible for one of them afterwards to say, "I was not a partner," any more than it would be possible for a man and woman who had gone through the formal ceremony of marriage before a Registrar, and had satisfied all the conditions of the law for making a valid marriage, to say that they were not man and wife, because at the same time one had said to the other, "Now, mind, we are not man and wife;" or to put another illustration,—Suppose a man allowed his friend to invest £10,000 consols in his name, and said, "I will hold the consols and pay the dividends to *A. B.* during his life, and then to *C. D.*, and afterwards to anybody whom you by will shall appoint, but, mind, I am not to be considered a trustee"—the stipulation that he was not to be a trustee would not prevent his being a trustee. The truth is, that there are certain legal relations which are entered into by agreeing to certain conditions, and when those conditions are agreed to, it is quite idle for people to superadd, or to attempt to superadd, a stipulation that the necessary legal consequences of those conditions shall not follow from the arrangement. In this case, supposing it was proved to my satisfaction that there had been a stipulation that the two persons were not to be partners, I could not regard that as altering the legal relation which they have entered into by making this contract. It is sworn on the one side that there was no such limitation, and on the other side only attempted to be proved by the oath of one witness that there was such a stipulated limitation. Therefore I feel compelled to come to the conclusion that what they had agreed to, namely, to share the profit and loss of this business, constituted between them the relation of partners.

I confess that I come to that conclusion with reluctance, because it seems to me that it is very necessary, in a case where a former servant in a business claims to be a partner with his master, that the burthen of proof should be thrown on him, and that the Court should not by any means be ready to accept proof of that relation between the clerk and his master when the master denies it, and when the person who was formerly a clerk claims it. If I want any authority to justify me in making that observation I think the recent case of *Naylor* v. *Farrer*, before the Court of Appeal, entirely justifies it. That was a case in which a person had been a clerk in a business, and claimed to be a partner with his master by reason of there being a contract that he should be remunerated out of profit. Although an agreement that a share of profit *primâ facie* brings about a relation of partnership, the Court in that case canvassed the evidence very closely, and came to the conclusion that the Plaintiff had not made out his case, and they decided that there was no partnership between the parties. Of course that case wanted the element which compels me to come to a different conclusion in the present, namely, an agreement to share not only profit but loss.

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Having come to the conclusion that I am bound to hold these gentlemen, on that which is admitted on both sides, to be partners, the next thing is what are the conditions of that partnership. In the first place, it is very clear that at the time when this partnership was arranged the whole of the capital sunk in the business, the mills and the buildings, the lease of these premises, the machinery, stock-in-trade, the horses, the waggons, and every single item of plant and what is ordinarily looked upon as capital, belonged to Mr. *Armstrong*. As to the mills and buildings, the original works, called the *Cumberland Works*, it was agreed or stipulated that they should still remain the property of Mr. *Armstrong*; Mr. *Pawsey*, I understand, does not claim any interest in that lease or in the business, except in respect of the expenditure, which I am going by and by to mention. I find in the evidence of the Defendant himself that which rather confirms, according to my view, the story of Mr. *Pawsey*. Mr. *Armstrong* says the agreement he made with *Pawsey* was—that he was to have his share of the profit and loss account; he says, "I made it as I thought perfectly distinct that he was not to be a partner, but only to receive his share on profit and loss account. I said that he was not to have a share beyond that; that the mill and all the property on the premises belonged wholly and solely to me." Now, if it was not arranged that these gentlemen should be partners, what was the necessity for making such a stipulation as that? Why should a man say to his clerk, when he was only talking to him about what remuneration the clerk was to receive, "Now, mind, the mill and all the property belong wholly and solely to me." Of course there would be no object in it. There would be nothing in the remuneration of the clerk, if that was the position of the person to whom the observation was made, which would cast the least doubt upon the ownership of the mills and other property.

Then one thing is very plain, that in determining, now that this partnership has come to an end, the mode in which it is to be wound up, it is incumbent on me to declare that all the property which Mr. *Armstrong* was employing in his business at the time when the arrangement was made must be treated as having been the capital of Mr. *Armstrong*. It is said that Mr.

Pawsey brought two small sums into the business; a sum of £210 at one time, and afterwards a sum of £1500, and that those sums have been treated as his capital. The books shew that from half-year to half-year there has been a division of profit according to the arrangement made, and, after the modification, by the increase of his share to one-fourth, according to that modification, and the profits have either been carried to his credit or dealt with precisely as though he were a partner in the concern. Afterwards this took place, which has occasioned a little difficulty. A lease was taken of some adjoining ground, and I have the evidence of Mr. *Wilson* that that had been considered and talked of years before, and finally, in the year 1871, the lease of this adjoining property was taken in the name of Mr. *Armstrong* alone. That property was afterwards built on, certain improvements were made in the original property also, which doubtless was the property of Mr. *Armstrong*.

Now, the first question is, how am I to treat this additional land so taken? Looking at all the evidence, I think I am bound to say that it was considered an accretion to the original property of Mr. *Armstrong*, and that I must treat the lease as being the property of Mr. *Armstrong*, just as the original lease of the *Cumberland Mills* is.

Then comes the question what is to be done as to the expenditure on the property, both on the *Cumberland Mills* and upon this additional property; and in order to make the inquiry which I think myself bound to direct upon that subject plain, and in order to prevent as far as I can any difficulty arising in the working out that inquiry, I wish to explain distinctly the grounds upon which I am going to direct that inquiry. If this money was expended out of what would otherwise have been divided as partnership profits, *primâ facie* the effect of that would be to diminish the amount of profits to be divided. If it did diminish the amount of profits to be divided, then the extent to which it diminished Mr. *Pawsey's* profits may be treated as having been expended out of Mr. *Pawsey's* money. But it does not follow, even then, that Mr. *Pawsey* is entitled to get that money back. It may be that the expenditure has been practically exhausted, that the partnership had the full benefit of it, and that nothing remains now to be divided or to be recovered in respect of that expenditure.

It may be that it was expended with Mr. *Pawsey's* full consent, as he admits, and with his eyes open to the fact that his interest would be a determinable interest, and it may be that having permitted the expenditure to be made, knowing precisely what his interest was, that he is not now entitled to get back any part of it. I do not mean to prejudice even that question. On the other hand, it may be that he looked to the partnership continuing much longer than it has in fact continued. The expenditure may have been so large that it is not an exhausted improvement even now, and it may be fair and right, looking to all the circumstances of the case, that he should have some portion of the money paid back to him in respect of that amount of profit which would otherwise have come to his share, and which has been expended upon these mills and cannot be treated as having been exhausted; and it is in order not to prejudice that, and to give him any advantage which he is fairly entitled to upon that last head, that I shall direct an inquiry upon the subject.

I think that concludes all the questions that I have to consider, except one, which is no doubt one of the most important of all. The partnership has now been dissolved. I do not know whether it was dissolved before the issue of the writ, but, at any rate, by the issue of the writ it was dissolved, being at that time a mere partnership at will.

Now, what is the right of Mr. *Pawsey*, if he was a partner, even in the limited way in which I have pointed out? I must hold that he was a partner upon the partnership being dissolved. It is said that the limitation was greater than that, and there is evidence that he was restricted in other ways; that he was not allowed to draw cheques upon the banking account; that for a time he entered into contracts, but that afterwards that was restricted by the express stipulation of Mr. *Armstrong*, who said that if he continued to do so he would dissolve his relation with him. Under the pressure of that threat he desisted, and ceased to sign contracts, and in other ways he was restricted in the carrying on of the business, and was not allowed, as I understand, to have the same privileges in respect of carrying on the business which Mr. *Armstrong* enjoyed; but it does not follow from all that that he was not a partner.

Of course partners may stipulate between themselves, and one partner may force another partner, by the threat of dissolution, to agree to limit the rights and dealings of the other partner in such a way, without preventing thereby the partnership relationship continuing, and that I must hold to have been the case here.

But then it is said that, seeing he was so restricted in all these respects, now that the dissolution has come, the Court is bound to hold that he had no interest in the goodwill.

I am totally unable to follow that argument. It may be that a particular partner is restricted in one hundred respects, which are matters of express stipulation between him and his co-partner, but how it can follow from that that he is restricted in one of his principal rights, as to which there was no stipulation, I confess that I am unable to see; and therefore I must hold that the ordinary result of dissolution follows, which is, that Mr. *Pawsey* is entitled, if he insists upon it, to have a sale of the business as a going concern. But then that sale must be made with a perfect understanding that the mills, all the land, and the leases belong absolutely and entirely to Mr. *Armstrong*, and are not to be affected by that sale in any shape or way; that nothing will pass by that sale except what are properly assets of the partnership (which of course will have to be determined in the accounts and inquiries which will have to be taken) and such goodwill, if there be any goodwill, as will remain when it is quite understood that the mills and premises, and any other exclusive property of Mr. *Armstrong*, are not to be interfered with and not to be sold, and that Mr. *Armstrong* will be entirely at liberty, whoever buys, to carry on his business at the mill in his own name, as long as and in such manner as he likes.

Then, moreover, I cannot help seeing that if such a sale is to be carried out, the most probable purchaser will be Mr. *Armstrong* himself, and I certainly shall give him every facility to make the purchase which I fairly can give; and therefore I shall direct, as I see the Master of the Rolls did in a recent case, that the sale shall be conducted by an independent firm of solicitors, and, if the parties cannot agree, then that the Judge at Chambers shall name the firm who are to conduct the sale, and that either party is to be at liberty to bid; and, of course, I direct that the sale shall be conducted by the independent firm of solicitors, in order to give either party the power of bidding, because otherwise, if the Plaintiff had the conduct of the sale I could not give him the power to bid.

Upon the whole, the decree which I think it right to make is to declare that the Plaintiff and the Defendant were partners from the 30th of June, 1869, to the 31st of December, 1872, in the proportion of one-fifth to the Plaintiff and four-fifths to the Defendant; and from the 31st of December, 1872, to the date of the service of the writ, in the proportion of one-fourth and three-fourths. I shall declare that the mill called the *Cumberland Mill*, and also the additional land and premises comprised in the lease of the 1st of March, 1871, are the exclusive property of the Defendant; declare that the assets and property of the concern to the date of the 30th of June, 1869, are to be treated as part of the capital of the Defendant in the business; direct the usual partnership accounts, with an inquiry whether, having regard to the terms of the partnership and the purposes for which the expenditure upon the mill and other buildings was made, any and what sum should now be allowed to the partnership in respect of such outlay. Then I shall direct the sale of the business as a going concern, to be conducted by a firm of independent solicitors subject to these declarations which I have made, and then I shall give liberty to all parties to bid, and reserve further consideration and liberty to apply.

As to costs, it is clear to my mind that each party has claimed more than I have held him to be entitled to, and I think the justice of the case will be best met by not giving any costs to either party.

Solicitors for Plaintiff: *Hollams, Son, & Coward.*
Solicitor for Defendant: *G. E. Philbrick.*

T. W. G.

END OF VOL. XVIII.

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18 Ch. D.

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ADMINISTRATION — *Administrator — Foreign Assets—Title of Administrator—Limited Administration granted to Attorney of Principal Administrator.*] *E.* having died in *Ireland* intestate, letters of administration were granted in *Ireland* to the Plaintiff. Part of his assets being in *India*, the Plaintiff sent out a power of attorney to *F. & Co.* in *India*, who procured letters of administration to be granted to them in *India* for the use and benefit of the Plaintiff, received the Indian assets, paid the Indian debts, and remitted the surplus to their agents in *England*. The Irish letters of administration were sealed in *England*:—*Held*, that the agents in *England* were bound to hand over the fund to the Plaintiff, and could not require the concurrence of the next of kin, they not having taken any legal proceedings to prevent the Plaintiff from receiving the assets.—Decision of *Fry*, J. (16 Ch. D. 407), affirmed. Eames *v.* Hacon - - - C. A. 347

2. —— *Costs—Executors appearing by same Solicitor — Defaulting Executor — Bankruptcy.*] Two executors, Defendants in an administration action, were represented by the same solicitor, to whom they had given a joint retainer. One of them was a debtor to the estate, and became bankrupt:—*Held*, that the costs incurred by them prior to the bankruptcy should be distinguished, and that the solvent executor should be allowed only his own proportion out of the fund, the defaulter's proportion being set off against the debt due from him: but that the costs incurred by both subsequently to the bankruptcy should be allowed in full.—*Watson* v. *Row* (Law Rep. 18 Eq. 680) dissented from. Smith *v.* Dale - 516

3. —— *Executor—Pledging Testator's Assets — Carrying on Testator's Business — Testator's Goods seised under fi. fa. against Executor—Lapse of Time — Acquiescence — Renewal of Testator's Lease in Executor's own Name—Deposit to secure Executor's own Debt—Equities—Priority—Purchaser for Value without Notice — Possession of Title Deeds—Order to give up Deed to facilitate Sale.*] If an executor, in pursuance of the directions contained in the testator's will, carries on the testator's business, and in so doing contracts debts, the fact that he has carried on the business in his own name and that the testator's assets employed in it are ostensibly the executor's own property, will not entitle a judgment creditor of the executor to take in execution the testator's assets.—Lapse of time and an enjoyment of the assets in a manner inconsistent with the trusts of the will, coupled with the consent of the beneficiaries, may, however, raise an inference of a gift of the assets by them to the executor, and entitle his judgment creditor to take them in execution. But, when the possession and the time which has elapsed are in accordance with the trusts of the will, no such inference can arise.—*Ray* v. *Ray* (G. Coop. 264) distinguished.—An executor, six years after the death of the testator, surrendered a lease belonging to the testator, and took a renewed lease, including additional property, and at an increased rent, in his own name. He afterwards deposited the lease as security for money advanced to him, which he applied to his own purposes. The renewed lease contained no mention of the surrender, and the mortgagee did not know that the borrower was an executor, or that he was not the beneficial owner of the lease. He did not, however, make any inquiry into the title.

ADMINISTRATION—*continued.*

An action was afterwards brought to administer the testator's estate, and a consent order was made for the sale of the leasehold property, without prejudice to any right, the mortgagee giving up the lease to facilitate the sale. He claimed to be paid the amount due to him by the executor out of the proceeds of sale.—*Held* (affirming the decision of *Fry*, J.), that the lease was in equity part of the testator's estate, and that the equity of the estate being prior to the equity of the mortgagee, must prevail against it:—*Held*, also, that the equitable mortgagee was not injured by the order to give up the indenture of lease, and did not thereby acquire any claim upon the proceeds of the sale. *In re* MORGAN. PILLGREM *v.* PILLGREM - - - - - - **C. A. 93**

4. —— *Executor — Retainer — Costs incurred in Probate Suit against Legacy.*] Legatees who were also next of kin of the testator, brought an action against the executor, seeking a revocation of the probate, but failed, and were ordered to pay the executor's costs of the action. While the action was pending, some of the Plaintiffs assigned and others mortgaged their shares whether under the will or on an intestacy. Afterwards, the legatees commenced an action against the executor in the Chancery Division for the administration of the estate:—*Held* (affirming the decision of *Hall*, V.C.), that the executor was entitled to set off the costs in the probate suit against the legacies, notwithstanding the assignments and incumbrances. *In re* KNAPMAN. KNAPMAN *v.* WREFORD - - - - **C. A. 300**

5. —— *Executor—Retainer—Equitable Assets—Real Estate—3 & 4 Will. 4, c. 104.*] Real estate is, by the statute 3 & 4 Will. 4, c. 104, made assets for the payment of debts only in equity, and an executor has no right of retainer against it.—Personal estate being the primary fund for the payment of specialty debts, the circumstance that the specialty debts of a testator, whose personal estate is insufficient to pay those debts in full, have been actually paid in the first instance partly out of the proceeds of the sale of real estate, will not give the executor a right to retain his own simple contract debt out of personal estate subsequently realized, which he would not have had if the whole personal estate had been applied in the first instance in payment of the specialty debts. WALTERS *v.* WALTERS - - 182

6. —— *Proof by Secured Creditor—Judicature Act*, 1875, *s.* 10—*Bankruptcy Rules*, 1870, *rr.* 99, 100, 101.] An equitable mortgagee obtained a common decree for administration of his deceased debtor's estate, and sent in a claim for the whole amount of his debt. When the certificate of debts came to be settled the mistake was pointed out, and the Chief Clerk required the Plaintiff to put a value on his security. He did so, and was admitted as a creditor for the balance, £28. The estate was then believed to be insolvent, but the fact had not been formally established. After the certificate had become binding the Plaintiff took out a summons asking that the property might be sold, and that he might be allowed to prove for the deficiency. A sale was ordered, and the summons directed to stand over. The property sold for much less than the value set upon it, and the summons was then brought on again:—*Held*, by *Fry*, J., and by the Court of Appeal, that by sect. 10 of the *Judicature Act*, 1875, rule 101 of the Bankruptcy Rules of 1870 was made applicable to the case, and that the Plaintiff could only stand as a creditor for £28. *In re* HOPKINS. WILLIAMS *v.* HOPKINS **C. A. 370**

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APPORTIONMENT—*Tenant for Life and Remainderman — Investment — Dividends.*] A testator after the *Apportionment Act*, 1870, bequeathed £—— to trustees, such sum to carry interest at 4½ per cent. until the same should be paid or appropriated, upon trust, with the consent of his wife, to invest the same in certain specified securities, and to pay the annual income of the legacy and the investments thereof, including in such income the interest payable in respect of such legacy, to his wife for life, with remainders over.—Interest was paid to the widow up to the day when, pursuant to an order of the Court, the bequeathed sum was invested in stocks on some of which five months' dividend had then accrued:—*Held*, that the Apportionment Acts did not apply, and that the widow was entitled to the whole of the dividends when received upon the purchased stocks. *In re* CLARKE. BARKER *v.* PEROWNE 160

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BANKRUPTCY—*Act of Bankruptcy—Bill of Sale—" Order and Disposition"—Hiring Agreement—Evidence—Custom of Trade—Professional Confidence.*] The Plaintiff lent furniture on hire to the Defendants, who were hotel-keepers, at a fixed sum to be paid by instalments, with a provision that until all the instalments were paid the property should remain in the Plaintiff, and if any instalment should not be paid when due the Plaintiff was to be at liberty to retake possession of his goods and the instalments to be forfeited, but upon all the instalments being paid the furniture to become the property of the Defendants. Upon one instalment being unpaid the Plaintiff put a man in possession of the furniture, and the Defendants executed an assignment of the lease of the hotel (which had been previously mortgaged to persons whom the Plaintiff had paid off) and of all their personal chattels and effects including the hired furniture, to the Plaintiff, and afterwards became bankrupt :—*Held* (affirming the decision of *Malins*, V.C.), that the hiring agreement did not operate as a bill of sale; that the assignment of the whole property of the Defendants, which was duly registered under the *Bills of Sale Act*, was an act of bankruptcy, but that the Plaintiff's furniture, not having been paid for, remained the property of the Plaintiff, and was not in the order and disposition of the bankrupt, and did not pass by the assignment; that the assignment was good so far as it was a mortgage of the leasehold, but was void so far as it was an assignment of the chattels as being an act of bankruptcy; and that the trustee in bankruptcy was entitled to all the personal effects of the bankrupt, but not to the hired furniture.—The custom of hotel-keepers holding their furniture on hire is now so well established that it ought to be taken judicial notice of.—*Held*, by *Malins*, V.C., that a solicitor employed to obtain the execution of a deed, and who is one of the witnesses, is not precluded, on the ground of a breach of professional confidence, from giving evidence as to what passed at the time of execution, by which the deed may be proved invalid. CRAWCOUR *v.* SALTER **C. A. 30**

2. —— *Adjudication of Bankruptcy—Infant—Trading Contract—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 125, *sub-s.* 12—*Infants' Relief Act*, 1874 (37 & 38 *Vict. c.* 62), *s.* 1.] An infant who has traded cannot be adjudicated a bankrupt on the petition of a person who has supplied him with goods on credit for trade purposes, but to whom he has made no express representation that he is of full age, even though he has previously filed a liquidation petition the proceedings under which have become abortive.—Nor could the Court under such circumstances make an adjudication against the infant under sub-sect. 12 of sect. 125 of the *Bankruptcy Act*, 1869.—Whether, if the infant had expressly represented to the petitioning creditor that he was of full age, an adjudication could be made, *quære.*—The *Infants' Relief Act*, 1874, applies to the trading contracts of an infant.—Decision of *Bacon*, C.J., reversed.—*Ex parte Lynch* (2 Ch. D. 227) overruled. *Ex parte* JONES. *In re* JONES [**C. A. 109**

3. —— *Composition Resolutions—Validity of subsequent Agreement by Debtor to pay one Creditor in Full—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 126.] After composition resolutions under sect. 126 of the *Bankruptcy Act*, 1869, have been passed and registered, the debtor cannot, before the completion of the composition in accordance with the resolutions, enter into a valid agreement with one of the creditors who is bound by the resolutions, to pay him his debt in full, even though the creditor agrees at the same time to give the debtor fresh credit.—Such an agreement would be inconsistent with good faith to the other creditors, and with the spirit of sect. 126.—The debtor does not stand in the same position as a discharged bankrupt until the composition has been fully paid.—*Jakeman* v. *Cook* (4 Ex. D. 26) distinguished, on the ground that there the debtor had obtained his discharge in a liquidation by arrangement *Ex parte* BARROW. *In re* ANDREWS - - - - **C. A. 464**

4. —— *Composition Resolutions—Registration—Presence of Debtor at Creditors' Meetings—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 126.] The meaning of sect. 126 of the *Bankruptcy Act*, 1869, is that the debtor must as a rule be personally present at the meetings of his creditors to consider a proposed composition, and personally produce his statement of affairs.—It is not sufficient that he should be in a room immediately adjoining that in which the meeting is held, ready to be called in if the creditors wish to examine him, even though the creditors are informed of this.—If he is not actually present in the room, he is bound to shew that he was prevented by sickness, or that the creditors, for some other cause satisfactory to them, excused his presence. If he does not do this, any resolutions passed accepting a composition will be invalid and cannot be registered.—*Ex parte Grunelins* (Weekly Notes (1876), 244) considered. *Ex parte* BEST. *In re* BEST - - - **C. A. 488**

5. —— *Composition Resolutions — Small Amount of Composition—Want of Bona Fides—Registration — Duty of Registrar — Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 126—*Bankruptcy Rules*, 1870, *r.* 295.] When the Registrar is satisfied, either from the small amount of composition offered or otherwise, that resolutions accepting a composition have been passed in the interest of the debtor, and not for the benefit of the creditors, it is his duty to refuse to register them, even though no creditor opposes the registration.—Resolutions accepting a composition of 2*d.* in the pound, payable in three months, and not secured in any way, were passed by the statutory majority of a debtor's creditors. His statement of affairs shewed that he had no assets :—*Held*, that the resolutions must have been passed in the interest of the debtor, not of the creditors; that they could not therefore bind the dissentient

BANKRUPTCY—*continued.*
creditors; and that the Registrar was right in refusing to register them, though no creditor opposed the registration.—*Ex parte Elworthy* (Law Rep. 20 Eq. 742) not followed. *Ex parte* Williams. *In re* Williams - - **C. A. 495**

6. —— *Liquidation—Estate of Trustee—Notice of Assignment of Chose in Action—Priority—Stop Order—Bankruptcy Act*, 1849, *s.* 141—*Bankruptcy Act*, 1869. *s.* 22—*Vendor and Purchaser—Doubtful Title.*] A legatee of a reversionary interest under a will, which had been paid into Court in an administration suit, presented a petition for liquidation in March, 1873, and a trustee was appointed. In July he assigned his interest in the legacy to *J.*, who obtained a stop order on the fund in Court. In November, 1876, he assigned his interest to *E.*, without notice of the liquidation, who also obtained a stop order on the fund. Afterwards the trustee in liquidation obtained a stop order. The Plaintiffs purchased the interest of the trustee in liquidation and of *J.*, and contracted to sell the legacy to the Defendant. The Defendant required *E.'s* mortgage to be abstracted as an incumbrance on the estate:—*Held*, by *Jessel*, M.R., that *E.* having obtained a stop order before the trustee in liquidation, his interest was prior to that of the trustee's, and was an incumbrance on the estate.—*In re Bright's Settlement* (13 Ch. D. 413) considered.—*Held*, by the Court of Appeal, that the question of the priority of *E.'s* incumbrance was too doubtful to justify the vendor in omitting it from the abstract; and the decision of the Master of the Rolls was accordingly affirmed. Palmer *v.* Locke - **C. A. 381**

7. —— *Protected Transaction—Elegit—Notice of act of Bankruptcy—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 95.] The delivery to the execution creditor of goods seized by the sheriff under an *elegit*, at the value appraised by the jury on the inquisition, is a sale of the goods within the meaning of sect. 95 (sub-sect. 3) of the *Bankruptcy Act*, 1869, and is protected by that sub-section if the creditor had not at the time of the delivery notice of any act of bankruptcy committed by the debtor prior to the seizure, and available against him for adjudication.—Notice of an act of bankruptcy committed between the seizure and the delivery will not deprive the creditor of the protection.—*Ex parte Schulte* (Law Rep. 9 Ch. 409) followed.—Leave given to appeal to the House of Lords. *Ex parte* Vale. *In re* Bannister - - - - **C. A. 137**

—— One of two executors—Costs - - **516**
See Administration. 2.

BANKRUPTCY RULES, 1870, rr. 99, 100, 101
See Administration. 6. [**370**

—— **r. 295** - - - - - - **495**
See Bankruptcy. 5.

BILL OF SALE—Act of bankruptcy - **30**
See Bankruptcy. 1.

BONA FIDES—Want of—Composition with creditors - - - - - **495**
See Bankruptcy. 5.

BOOK—Title of—Copyright—Registration **76**
See Copyright.

BREACH OF DUTY—Solicitor and client - **449**
See Mortgage. 3.

BUILDING SOCIETY—*Certificate of Incorporation—Irregularity of Proceedings—Power of Court to declare Certificate void—Prerogative of Crown—Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *ss.* 7, 9, 12, 32.] The Court has no power to declare the certificate of incorporation of a building society, given by the Registrar under the provisions of the *Building Societies Act*, 1874, void on the ground that it has been obtained irregularly. Glover *v.* Giles - - - - **173**

BUSINESS—Carried on by executor - **93**
See Administration. 3.

CALLS—Unpaid—Receiver - - - **155**
See Railway Company.

CASES: *Albion Life Assurance Society, In re* (16 Ch. D. 83) - - - - **639**
See Company. 4.

—— *Arrowsmith's Trusts, In re* (29 L. J. (Ch.) 774; 2 D. F. & J. 474), approved and followed - - - - **218**
See Will. 4.

—— *Attorney-General* v. *Sidney Sussex College* (15 W. R. 162) followed - - **596**
See Charity. 2.

—— *Boyd's Settled Estate, In re* (21 W. R. 667), followed - - - - **646**
See Lands Clauses Act. 1.

—— *Brackenbury* v. *Gibbons* (2 Ch. D. 417) not followed - - - - **524**
See Will. 2.

—— *Bright's Settlement, In re* (13 Ch. D. 314), considered - - - - **381**
See Bankruptcy. 6.

—— *Brocklehurst* v. *Jessop* (7 Sim. 442) overruled
See Mortgage. 3. [**449**

—— *Bubb* v. *Padwick* (13 Ch. D. 517) disapproved - - - - **218**
See Will. 4.

—— *Clarke* v. *Hart* (6 H. L. C. 633) distinguished - - - - **660**
See Company. 3.

—— *East Botallack Consolidated Mining Company, Re* (34 Beav. 82), disapproved
See Company. 5. [**472**

—— *Eccleshill Local Board, In re* (13 Ch. D. 365), disapproved - - - - **146**
See Lands Clauses Act. 3.

—— *Elworthy, Ex parte* (Law Rep. 20 Eq. 742), not followed - - - **495**
See Bankruptcy. 5.

—— *Grunelins, Ex parte* (Weekly Notes, 1876, p. 244), considered - - - **488**
See Bankruptcy. 4.

—— *Hampson* v. *Fellows* (Law Rep. 6 Eq. 575) not followed - - - **127**
See Mortgage. 1.

—— *Hollier* v. *Burne* (Law Rep. 16 Eq. 163) followed - - - - **624**
See Renewable Lease.

—— *Holme* v. *Guy* (5 Ch. D. 901) observed upon
See Charity. 2. [**596**

CASES—*continued.*

—— *Hornby, Re* (7 W. R. 729), followed - 614
See Will. 6.

—— *Houldsworth* v. *City of Glasgow Bank* (5 App. Cas. 317) distinguished - 587
See Company. 2.

—— *Hutchin* v. *Mannington* (1 Ves. 366) distinguished - - - - 218
See Will. 4.

—— *Jakeman* v. *Cook* (4 Ex. D. 26) distinguished
See Bankruptcy. 3. [464

—— *Johnson* v. *Crook* (12 Ch. D. 639) approved
See Will. 3, 4. [218, 634

—— *Kay* v. *Oxley* (Law Rep. 10 Q. B. 360) followed - - - - 616
See Way.

—— *Langley* v. *Hammond* (Law Rep. 3 Ex. 161) not followed - - - 616
See Way.

—— *Lynch Ex parte* (2 Ch. D. 227), overruled
See Bankruptcy. 2. [109

—— *Maddy* v. *Hale* (3 Ch. D. 327) followed 624
See Renewable Lease.

—— *Maden* v. *Taylor* (45 L. J. (Ch.) 569) approved and followed - - 213
See Woman past Child-bearing.

—— *Martin* v. *Martin* (Law Rep. 2 Eq. 404) distinguished - - - - 218
See Will. 4.

—— *Meyrick's Charity, In re* (1 Jur. (N.S.) 438), followed - - - - 596
See Charity. 2.

—— *Mudford's Claim* (14 Ch. D. 634) followed
See Company. 2. [587

—— *Part's Case* (Law Rep. 10 Eq. 622) not followed - - - - 530
See Company. 8.

—— *Pike* v. *Fitzgibbon* (17 Ch. D. 454) followed
See Settlement. 2. [531

—— *Ray* v. *Ray* (G. Coop. 264) distinguished 93
See Administration. 3.

—— *Schulte, Ex parte* (Law Rep. 9 Ch. 409), followed - - - - 137
See Bankruptcy. 7.

—— *Sterndale* v. *Hankinson* (1 Sim. 393) observed upon - - - 551
See Limitations, Statute of. 1.

—— *Thomson* v. *Waterlow* (Law Rep. 6 Eq. 36) not followed - - - 616
See Way.

—— *Watson* v. *Row* (Law Rep. 18 Eq. 680) dissented from - - - - 516
See Administration. 2.

—— *Watts* v. *Kelson* (Law Rep. 6 Ch. 166) followed - - - - 616
See Way.

—— *Weldon* v. *Dicks* (10 Ch. D. 247) considered
See Copyright. [76

—— *Willoughby* v. *Middleton* (2 J. & H. 344) questioned - - - - 531
See Settlement. 2.

—— *Wilson* v. *Church* (11 Ch. D. 576) explained
See Practice. 4. [394

—— *Wood's Estate, In re* (Law Rep. 10 Eq. 572), followed - - - - 624
See Renewable Lease.

CERTIFICATE—Incorporation of building society
See Building Society. [173

CHARITY—*Cy-près—Scheme by Charity Commissioners—Eleemosynary Gift—Apprentice Fees—Application to Education—Discretion of Commissioners—Appeal.*] A sum of money was given by a testatrix in 1643 to be laid out in the purchase of lands of the annual value of £10, one half to be applied towards the better relief of the most poor and needy people of good life and conversation in the parish of *K.*, to be paid to them half-yearly in the church or the porch thereof: and the other half to apprentice one poor boy or more of the parish. At that time *K.* was a small village, but it had now increased to a large and wealthy town, and the income of the charity estate had increased to more than £2000.—The Charity Commissioners settled a scheme by which they appropriated the income to the following objects: (*a*) The relief of poor deserving objects of the parish in case of sudden accident, sickness, or distress. (*b*) Subscriptions to dispensaries and hospitals in the parish. (*c*) Annuities for deserving and necessitous persons who had resided seven years in the parish. (*d*) The advancement of the education of children attending elementary schools. (*e*) Premiums for apprenticeship and outfits for poor boys of the parish. (*f*) Payments to encourage the continuance of scholars at public elementary schools above the age of eleven years. (*g*) Exhibitions at higher places of education. (*h*) Providing lectures and evening classes.—Some of the parishioners objected to the application of the income to educational purposes:—*Held* (reversing the decision of *Hall*, V.C.), that, considering the enormous increase of the income of the charity and of the population of the parish, and the change of the circumstances and habits of the people, the application of the income of the charity *cy-près* to educational and other charitable purposes was justifiable, and that the scheme of the Charity Commissioners ought to be confirmed.—A long-continued unauthorized *cy-près* application of charity funds by the trustees is no ground of objection to a scheme of the Charity Commissioners directing a different *cy-près* application.—The Court of Appeal will not interfere with the details of a scheme of the Charity Commissioners, unless they have exceeded their authority or the scheme contains something wrong in principle or wrong in law. *In re* Campden Charities - - - - **C. A. 310**

2. —— *Collegiate Body—Surplus Revenues to be paid to Ecclesiastical Commissioners for Administration—Action against Collegiate Body for Accounts—Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *ss.* 17, 62—*Consent of Charity Commissioners—Mandamus.*] By an ancient charter a collegiate body was founded at *Manchester*, and they were seised of the rectory of the parish, and of the tithes, glebe lands, and other property for religious and temporal purposes in the parish. The property having considerably increased in value, an Act of Parliament was in 1850 passed authorizing the division of the parish into several parishes, and for the application of the revenues. Accounts of receipts and expenditure by the collegiate body were to be rendered yearly to the Ecclesiastical Commissioners, by whom it was to be applied and the surplus paid, *inter alia*, in payment of yearly or other sums as to them should seem fit to each and every or any one or more of

CHARITY—*continued.*
the incumbents of the benefices in the parish. The accounts which were rendered by the collegiate body to the Commissioners were complained of by the incumbents on the ground that many of the disbursements were illegal. A request made to the Ecclesiastical Commissioners to take proceedings to check the expenditure being declined, the incumbents brought an action against the collegiate body for the purpose of enforcing a compliance with the statute, and the Ecclesiastical Commissioners were made co-Defendants. A mandamus was claimed against the collegiate body to compel them to render accounts. Both Defendants demurred, one ground being that the consent of the Charity Commissioners to the action had not been obtained :—*Held*, that the object of the action was to obtain a proper account of the funds which ought to be transferred to the Ecclesiastical Commissioners and which would be administered by them as charity for the benefit of the incumbents of the benefices, therefore the consent of the Charity Commissioners to the action proceeding was, under the 17th section of the *Charitable Trusts Act* of 1853, necessary.—*In re Meyrick's Charity* (1 Jur. (N.S.) 438) and *Attorney-General* v. *Sidney Sussex College* (15 W. R. 162) followed.—*Held*, also, that, though a mandamus were the only relief sought for, the matter would still be left within the operation of the 17th section of the Act, because a mandamus is a proceeding for obtaining an order concerning a charity.—*Holme* v. *Guy* (5 Ch. D. 901) observed upon. Attorney-General *v.* Dean and Canons of Manchester - - - - - 596

CHARITY COMMISSIONERS—Consent of 596
See Charity. 2.

—— Scheme - - - - - - 310
See Charity. 1.

CHOSE IN ACTION—Assignment — Priority — Notice - - - - - 381
See Bankruptcy. 6.

CLASS—Gift to - - - - - 441
See Will. 8.

CO-DEFENDANTS—Costs—Contribution - 236
See Practice. 5.

COLLEGIATE BODY — Ecclesiastical Commissioners - - - - - 596
See Charity. 2.

COMPANY—*Borrowing Powers—Debenture Stock — Mortgages — Companies Clauses Act*, 1863 (26 & 27 *Vict.* c. 118), *Part* III.—*Priority—Debenture Stock* "*at any time created by the Company*" —*Practice—Rules of Court*, 1875, *Order* LVIII., *r.* 6.—*Costs—Cross Notice of Appeal.*] By the *Cornwall Minerals Railway Act*, 1873, the *Cornwall Minerals Railway Company* was empowered to borrow on mortgage to the extent of £250,000, and to issue debenture stock subject to the provisions of the *Companies Clauses Act*, 1863, Part III., but notwithstanding anything therein contained, the interest of all debenture stock "at any time created by the company" was to rank *pari passu* with the interest of all mortgages "at any time granted by the company" and should have priority over all principal money secured by such mortgages.—By a later Act of 1875, the company were empowered to raise additional capital; and after providing that the principal secured by all mortgages granted by the company before the passing of the Act, should have priority over the principal secured by all mortgages granted by virtue of that Act, the company was empowered to issue debenture stock subject to the provisions of the *Companies Clauses Act*, 1863, but the interest of all debenture stock created and issued at any time after the passing of that Act was to rank *pari passu* with the interest of all mortgages granted after the passing of that Act, and should have priority over all principal moneys secured by such mortgages. —By another Act of 1877 power to raise a further sum by the issue of debenture stock under provisions similar to those in the Act of 1875 was given to the company.—The company granted mortgages and issued debenture stock under the powers of the Act of 1873 before the passing of the Act of 1875.—They also issued further debenture stock under the powers of the Act of 1873 after the passing of the Act of 1875, but before the passing of the Act of 1877. They also issued further debenture stock under the powers of the Act of 1873 after the passing of the Act of 1877; and also issued debenture stock under the powers of the Acts of 1875 and 1877 after the passing of the Act of 1877.—The company being unable to pay the interest on all these mortgages and debenture stocks in full, a receiver of the undertaking was appointed by the Court, and a special case settled for ascertaining the priorities :—*Held*, first, that notwithstanding the words "at any time" in the Act of 1873 the enactment therein contained applied only to the mortgage debt and debenture stock for which provision was made by that Act.—Secondly, that upon the true construction of the several Acts of 1873, 1875, and 1877, the order of priority of the interest on the mortgages and debenture stocks was as follows :—(1.) The interest on the mortgages and debenture stocks granted and issued under the powers of the Act of 1873 previously to the passing of the Act of 1875.—(2.) The interest on the debenture stock issued under the Act of 1873 after the passing of the Act of 1875, but before the Act of 1877.—(3.) The interest on the debenture stock created under any of the Acts, after the passing of the Act of 1877.—Thirdly, that the principal of mortgages for the time being due had priority of payment next after the interest of the debenture stock issued before the passing of the Act of 1875.—The decision of *Hall*, V.C., substantially affirmed.—A Respondent who has given cross notice of appeal under Order LVIII., r. 6, is in the same position as to costs as if he had presented a cross appeal.—Where there were two Respondents to an appeal, one of whom gave cross notice of appeal affecting his co-Respondent, the Court made an apportionment of the costs of the appeal. Harrison *v.* Cornwall Minerals Railway Company [**C. A. 334**

2. —— *Debentures given up to be cancelled—Contract by Company to issue fully paid-up Shares—Consideration—Contributory—Proof for Damages in the Liquidation—Companies Act*, 1867, *s.* 25.] *A.*, a director, and the solicitor of the *Great*

COMPANY—*continued.*

Australian Gold Mining Company, obtained by assignments from *K.*, one of the vendors of a mine, situate in *South Australia*, to the company two debentures of and which were given by the company for 500 each in part payment of the purchase-money; and in consideration of *A.* giving them up to be cancelled the company contracted to issue to him 500 £2 fully paid-up shares. No contract was ever registered under the provisions of the 25th section of the *Companies Act*, 1867. *A.* had been by order of the Court placed on the list of contributories for the 500 shares.—On summons taken out by *A.*:—*Held*, that there was no duty cast upon him to register the contract; and that the breach of the contract by the company having been established, *A.* was entitled to prove in the liquidation for damages for calls made or which might be made on the shares.—*Mudford's Claim* (14 Ch. D. 634) followed.—*Houldsworth* v. *City of Glasgow Bank* (5 App. Cas. 317) distinguished. Great Australian Gold Mining Company. *Ex parte* Appleyard - 587

3. —— *Cost-book Mine — Partner — Claim — Lying-by — Lapse of Time.*] At a meeting of the partners in a cost-book mine held in 1874, it was stated that the mine was £2003 in debt, and a call of £25 was made upon each of the six shares in the mine. Two of the partners did not pay this call, and were in arrear for other calls. At subsequent meetings in June, 1874, the shares of these partners were declared to be forfeited. These two partners took no steps as to the mine until July, 1879, when they made a claim, and in September, 1880, they brought an action, alleging that the shares had not been regularly forfeited, and claiming to be still partners. It appeared that the mine was in debt in 1878:—*Held*, that even assuming the shares not to have been regularly forfeited, the Plaintiffs, under the circumstances, could not, after lying by for more than six years, successfully assert their claim to be partners.—*Clarke* v. *Hart* (6 H. L. C. 633) distinguished. Rule *v.* Jewell - - 660

4. —— *Insurance Society—Contributory—Participating Policy-holders—Assignment of Policy.*] It having been held in *In re Albion Life Assurance Society* (16 Ch. D. 83) that assurance members, being participating policy-holders of the *Albion Society*, were contributories in the winding-up of the company:—*Held*, that a policy-holder who had assigned his policy ceased to be liable as a contributory, although no other person had been made liable to contribute in respect of his policy in his stead. *In re* Albion Life Assurance Society. Brown's Case - - 639

5. —— *Winding-up — Business never commenced—Jurisdiction of High Court—Stannaries Court—Companies Act*, 1862, *ss.* 81, 116.] The words "engaged in working" mines in the 81st section of the *Companies Act*, 1862, mean "is or has been engaged in working, or "now or formerly engaged in working" mines in *Cornwall*, and do not apply to a case where the company, although they have purchased a mine in *Cornwall*, have not begun to work it.—Where, therefore, a company was formed to purchase mines in "*Cornwall* or elsewhere in *England*," and contracted to purchase a right to have a lease of a mine in *Cornwall*, but never acquired the lease or began to work the mine:—*Held*, that the High Court of Chancery had jurisdiction to make a winding-up order.—*Re East Botallack Consolidated Mining Company* (34 Beav. 82) disapproved of. *In re* Silver Valley Mines - **C. A. 472**

6. —— *Winding-up — Contributory — Shares taken by a Husband in his Wife's Name.*] *S.* (a Parsee merchant) applied for 300 shares in the *London, Bombay, and Mediterranean Bank*, 100 in his own name and 200 in the name of his wife *M.*, paying the deposit on the whole 300 out of his own moneys. The company allotted the shares accordingly, and *S.* subscribed the memorandum and articles of association on *M.'s* behalf as well as his own, and paid all calls upon all the shares. *S.* afterwards sold and transferred 140 of the shares allotted to *M.*, executing the transfers for her, or in her name. All these transactions took place without *M.'s* knowledge.—In 1866 the company was ordered to be wound up, and at that date the name of "*M.* the wife of *S.*" was on the register as a past holder of 140 shares, and the then holder of sixty shares.—*S.* died shortly afterwards, and the name of *M.* was placed upon the A list of contributories in respect of sixty shares, and upon the B list in respect of 140 shares.—*M.* had no separate estate.—Upon an application by the liquidator to have the B list rectified by placing thereon the names of *S.'s* executors instead of the name of *M.*:—*Held*, that the company having accepted the wife as a shareholder without any misrepresentation or concealment on the part of the husband, his estate was not liable, and the company were not entitled to any rectification of the list. *In re* London, Bombay, and Mediterranean Bank - - - - - 581

7. —— *Winding-up Petition—Jurisdiction—Solvent Company—Creditor—Disputed Debt—Injunction.*] The Court has jurisdiction to restrain by injunction a person claiming to be a creditor of a company from presenting a petition to wind up the company, where the debt is *bonâ fide* disputed, and the company is solvent. Cercle Restaurant Castiglione Company *v.* Lavery - - 555

Niger Merchants Company *v.* Capper 557, n.

8. —— *Winding-up — Representative Case — Costs.*] In a representative case for the opinion of the Court in the winding-up of a company, the costs of the parties will be allowed out of the estate as between party and party only, and not as between solicitor and client.—*Part's Case* (Law Rep. 10 Eq. 622) not followed on this point. *In re* Mutual Society. Grimwade *v.* Mutual Society [530

9. —— *Winding-up—Stay of Action—Mortgage—Interest on Mortgage Debt.*] Mortgagees having a right of distress to enforce payment of interest will be allowed to distrain after a winding-up for interest accrued while the liquidators were in possession, but not for arrears accrued before the winding-up. *In re* Brown, Bayley, & Dixon. *Ex parte* Roberts and Wright - 649

—— Railway company—Abandonment - 155
See Railway Company.

—— Purchase of lands - - - 429
See Lands Clauses Act. 2.

COMPOSITION - - 464, 488, 495
See Bankruptcy. 3, 4, 5.

COMPROMISE—Divorce suit - - 670
See Husband and Wife. 1.

CONDITION PRECEDENT—Performance of covenants - - - - 238
See Landlord and Tenant.

CONSENT—Marriage with consent of guardians
See Will. 1. [61

CONTINGENT LEGACY - - - 614
See Will. 6.

CONTINGENT REMAINDER—Will - 524
See Will. 2.

CONTRACT—For shares—Registration - 587
See Company. 2.

CONTRIBUTION—Costs—Co-Defendants 236
See Practice. 5.

CONTRIBUTORY — Married woman — Shares taken by husband in wife's name 581
See Company. 6.

—— Participating policy-holder - - 639
See Company. 4.

CONVEYANCE—By married woman - 106
See Husband and Wife. 2.

COPYHOLD—*Custom of Descent—Jus Representationis.*] The custom of a manor was stated to be that all copyholds descended to the youngest son or daughter, brother or sister, uncle or aunt.—A tenant died intestate seised of customary lands of the manor, leaving neither son, daughter, brother, sister, uncle, nor aunt; but leaving sons of deceased uncles:—*Held*, that the youngest son of the youngest uncle was not entitled, and that the heir-at-law was entitled to the lands. *In re* Smart. Smart *v.* Smart - - - 165

COPYRIGHT—*Copyright in Title of Book—Trade-mark—Registration of Part of a Book—Practice—Appeal for Costs.*] The Plaintiff published in numbers, in a weekly periodical called "*Every Week*," a tale intituled "*Splendid Misery; or, East End and West End*," by *C. A. Hazlewood.* The Defendant subsequently commenced issuing in weekly parts, in a newspaper published by him, a tale by Miss *Braddon* intituled "*Splendid Misery.*" The Plaintiff was registered as the proprietor of "*Every Week*" before the publication of it began, and after the tale had been completed he had himself registered as the proprietor of "*Splendid Misery; or, East End and West End,*" giving the date of publication of the number of "*Every Week*" which contained the first number of the tale as the date of the publication of the tale. He then commenced an action to restrain the Defendant from continuing his publication of Miss *Braddon's* tale under the title of "*Splendid Misery,*" and moved for an injunction. Before the motion was made the Defendant had altered the title of Miss *Braddon's* tale, and the motion was ordered to stand over till the trial, the Defendant undertaking not to alter the new title in the meantime. The tale was finished under the new title before the trial. It was proved that a novel which once had a large circulation had been published in 1801 under the title of "*Splendid Misery,*" and that second-hand copies could still be met with. At the trial, *Bacon*, V.C., *held* that the Defendant had infringed the Plaintiff's copyright, and made an order containing no declaration of right, but simply ordering the Defendant to pay the whole costs of the action. The Defendant appealed, contending that the Plaintiff had no title, and that the action ought to have been dismissed:—*Held*, that it is not within the discretion of the Court to make a Defendant pay the whole costs of an action if the Plaintiff has no right to sue, that there was therefore implied in the order a declaration that the Plaintiff had a good cause of action, and that an appeal would lie:—*Held*, that though the registration of "*Every Week*" being made before any part of that periodical was published was not a good registration, the subsequent registration of the first number of the tale was a good registration to enable him to sue in respect of infringement of copyright in the title of the tale, supposing such copyright to exist:—But *held*, that the Plaintiff had no copyright in the title "*Splendid Misery,*" for that copyright can only exist in something original, and the mere adopting as a title a hackneyed phrase, which moreover had been used as the title of a novel many years before, and which for anything that appeared might have been copied from that novel, could not give any copyright in that title:—*Held*, therefore, that the Plaintiff had no title to sue for infringement of copyright, and that as it was clear that the public could not be misled into purchasing the Defendant's tale under the belief that it was the same as that of the Plaintiff, so that there was no ground for the interference of the Court on the principles applicable to trade-marks, the action ought to be dismissed with costs.—*Semble*, that, as a general rule, there cannot be any copyright in the title of a book.—*Weldon* v. *Dicks* (10 Ch. D. 247) considered. Dicks *v.* Yates - - C. A. 76

CORNWALL—Company for working mine in—Winding-up order - - - 472
See Company. 5.

COST-BOOK MINE—Forfeiture of shares—Lapse of time - - - - 660
See Company. 3.

COSTS - - - - - - - 521
See County Court.

—— Administration suit — Executors — Bankruptcy of one - - - 516
See Administration. 2.

—— Appeal—Cross notice - - - 334
See Company. 1.

—— Appeal for - - - - 76
See Copyright.

—— Appeal for - - - - 58
See Practice. 2.

—— Co-Defendants—Contribution - 236
See Practice. 5.

—— Probate suit—Set-off against legacies 300
See Administration. 4.

—— Winding up of company - - 530
See Company. 8.

—— Withdrawal of defence - - 362
See Practice. 6.

COUNTY COURT—*Practice—Administration Action—Costs—Solicitor and Client—Taxation—Jurisdiction of High Court—Attorneys and Solici-*

COUNTY COURT—*continued.*
tors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37—*County Courts Act*, 1856 (19 & 20 *Vict. c.* 108), *ss.* 35, 36—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 16—*County Courts Act*, 1875 (38 & 39 *Vict. c.* 50), *s.* 8—*County Courts Rules*, 1875, *Order* XXXVI., *r.* 1.] By the combined operation of the *Attorneys and Solicitors Act*, 1843 (6 & 7 Vict. c. 73), s. 37, and the *Judicature Act*, 1873, s. 16, as modified by the *County Courts Act*, 1856, s. 36, the costs as between solicitor and client in a County Court action in which the claim exceeds £20 may be taxed in the High Court of Justice: consequently, the costs as between solicitor and client in a County Court administration action may be taxed in the Chancery Division. *In re* Worth - 521

COUNTY COURT RULES, 1875, Order XXXVI., r. 1 - - - - - 521
See County Court.

COVENANT—*Covenant to buy Beer of Landlord—Implied Obligation on Covenantee.*] A covenant by the tenant of a public-house to purchase of his landlord all beer to be sold or consumed in or upon the premises is not broken by the tenant buying through an agent, without the knowledge of the landlord, beer made by the landlord.—*Semble*, that where such a covenant is entered into by a tenant there is, in the absence of express stipulation, an implied obligation on the part of the landlord to supply the tenant with such kinds of beer as he requires, and if this obligation is not fulfilled the tenant is at liberty to buy the beer which he requires elsewhere. Edwick *v.* Hawkes - - - - - 199

—— Separation deed - - - 670
See Husband and Wife. 1.

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FIRE INSURANCE—*Vendor and Purchaser—Fire after Contract but before Completion—Right to Insurance Money.*] A vendor contracted with a purchaser for the sale of a house which had been insured by the vendor against fire. The contract contained no reference to the insurance. After the date of the contract but before the time fixed for completion the house was damaged by fire, and the vendor received a sum of money from the office:—*Held*, by *Brett* and *Cotton*, L.JJ. (affirming the decision of *Jessel*, M.R.), *James*, L.J., *dissentiente*, that the purchaser, who had completed his contract, was not entitled as against the vendor to the benefit of the insurance.—*Per Brett* and *Cotton*, L.JJ.: Whether the office could not compel the vendor to refund the money, —*quære*. RAYNER *v.* PRESTON - - **C. A. 1**

FORCIBLE ENTRY—*Landlord and Tenant—License to eject—5 Rich. 2, Stat. 1, c. 8.*] A license by a tenant to his landlord to eject him on a specified day without any process of law is void, as authorizing the commission of an act which is made illegal by the Act 5 Rich. 2, stat. 1, c. 8.—If a person, who has a legal right of entry upon land which is in the possession of a wrongdoer, is allowed to enter peaceably through the outer door, it is still illegal for him to turn out the wrongdoer with violence. EDWICK *v.* HAWKES [199

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HUSBAND AND WIFE—*Compromise of Divorce Suit—Specific Performance of Separation Deed—Jurisdiction of Court—Custody of Children by Wife—Agreement not too vague—"Usual Covenants"—Dum Casta Clause—Reference to Arbitration—Evidence—Mistake.*] The Plaintiff, Mrs. *H.*, who was the wife of the Defendant, claimed specific performance of an agreement for a separation deed entered into upon the compromise of a suit in the Divorce Court which was instituted by the husband against the wife for a divorce on the ground of adultery. The agreement was signed by both husband and wife after the husband's evidence in support of his case had been heard and before the wife's defence had been commenced, and was in these terms:—"Petition and answer dismissed. Deed of separation with usual covenants; costs of preparing deed to be borne by Mr. *H.* Mr. *H.* to pay Mrs. *H.* for herself and child or children £150 a year quarterly. Mrs. *H.* to maintain the child or children. Mr. *H.* to pay wife's costs. In case of difference in working out these terms matter to be referred to Mr. *W.* and Dr. *D.*" (the leading counsel on each side):—*Held*, that this Court had power to enforce specific performance of an agreement for a separation deed and for the compromise of a suit in the Divorce Court without infringing the *Judicature Act* prohibiting interference with proceedings pending in another branch of the Court:—That the Court would not refuse specific performance of an agreement for a separation deed on the ground that it provided for the wife having the custody of the children:—That husband and wife were competent to make a binding agreement for compromise of a divorce suit, and that this agreement was not too vague to be enforced by the Court:—That a *dum casta* clause did not come within the term "usual covenants" in a separation deed agreed to as part of the terms of compromise of a divorce suit:—That the Court would construe the term "usual covenants" in reference to surrounding circumstances, but the adultery of the wife not having been proved could not form an element for the consideration of the Court:—That the agreement on the face of it being complete, the arbitration clause could only come into force in case of difference between the parties, and did not oust the jurisdiction of the Court to settle the deed itself.—Decree for specific performance; the deed of separation to be settled in Chambers if the parties differed, and no *dum casta* clause to be inserted.—It is no answer to a suit for specific performance for Defendant to say that though he understood what the words of the agreement were, he was under a mistake as to their legal effect. HART *v.* HART - - 670

HUSBAND AND WIFE—*continued.*

2. —— *Wife's Interest in Land—Fines and Recoveries Act* (3 & 4 *Will.* 4, *c.* 74), *s.* 77.] A fund of personalty was settled in 1842 upon trust during the joint lives of a husband and wife for the wife for her separate use without power of anticipation, then for the survivor during his or her life, and after the death of the survivor for such of their children as being sons should attain twenty-one, or being daughters attain that age or marry, in equal shares. There was no power to invest in purchase of land. The trustees bought a freehold house with part of the fund. The only children were two daughters, who attained twenty-one and married. After this the trustee, the husband and wife, and the daughters and their husbands, by deed duly acknowledged by the daughters, conveyed the estate to such uses as the father and mother should jointly appoint, and in default as the survivor should by deed or will appoint. After the death of the mother the father contracted to sell the estate. The purchaser objected to the title on the ground that, as the purchase of real estate was unauthorized, the interest of the daughters was still to be treated as a reversionary interest in personalty of which they could not dispose:—*Held* (reversing the decision of *Hall*, V.C.), that the father could make a good title. *In re* DURRANT AND STONER - **C. A. 106**

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JURISDICTION — High Court—Winding-up of mining company—Stannaries Court 472
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—— Injunction to restrain winding-up petition [555
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—— Sequestration—Payment of money in Court to sequestrator - - - 653
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LANDLORD AND TENANT—*Lessor and Lessee—Renewal of Lease—Performance of Covenants—Condition Precedent.*] The lease of a house contained a covenant by the lessee to pay the rent and keep the premises in repair, and to paint the outside and inside at certain fixed periods; and the lessor covenanted that the lessee should be entitled, on giving six months' notice before the end of the term, to have a further lease for twenty-one years "upon paying the rent and performing and observing the covenants" in his lease. The lessee applied for a renewal of his lease, but the lessor refused to grant such renewal, on the ground that the covenants had not been fulfilled either at the date of the six months' notice or at its expiration:—*Held*, that the performance of the covenants was a condition precedent to the lessee's privilege of having a renewed lease, and, the requisite painting and repairs not having been completed either when the six months' notice was given or when it expired, the lessee was not entitled to a renewal of his lease. BASTIN *v.* BIDWELL - - - - 238

—— Covenant to buy beer of the landlord—Mutual obligation - - - 199
See COVENANT.

—— Forcible entry - - - - 199
See FORCIBLE ENTRY.

LANDS CLAUSES ACT—*Purchase-money—Cash under Control of Court—Investment*—23 & 24 *Vict. c.* 38, *s.* 10—*General Order of Court of Chancery*, 1*st February*, 1861, *r.* 1—*Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *s.* 70.] Money paid into Court under the *Lands Clauses Act*, 1845, or under any other Act which directs money so paid in to be invested in specified securities, is not "cash under the control of the Court," within the meaning of the Act 23 & 24 Vict. c. 38, s. 10, and the General Order of the 1st of February, 1861, r. 1, and the Court cannot order such money to

LANDS CLAUSES ACT—*continued.*

be invested in any securities but those which are specified in the Act under which it is paid in.—*In re Boyd's Settled Estate* (21 W. R. 667) followed. *Ex parte* VICAR OF ST. MARY, WIGTON [646

2. —— *Taking Lands—Lands Clauses Act, 1845, ss. 7, 9—Sale by Trustees for Persons absolutely entitled—Married Women entitled for Separate Use—Trustee acting as Surveyor under the 9th section—Power of Sale, Determination of.*] A testator devised his residuary real estate (which comprised land in respect of which a notice to treat had been given by a railway company) to trustees in trust for his wife for life, and after her death to assure the same to his two married daughters, in equal shares, for their separate use as tenants in common, with a gift over in favour of their issue in events which did not happen: and "for the purpose of division" he empowered his trustees to sell his residuary estate; and declared that his trustees might receive payment for all business done by them in relation to the estate.—The testator's wife, his two daughters and their husbands, survived the testator: and after the death of the widow the trustees sold and conveyed the lands to a railway company for a price which had been determined by the valuation of two surveyors, as provided the the 9th section of the *Lands Clauses Act*, 1845, the trustees having first, for the purposes of such valuation, appointed one of themselves as the surveyor on their behalf. One of the testator's daughters disputed the validity of the sale, and brought an action to restrain the company from taking or using the land:—*Held*, first, that whether the power of sale under the will was still in existence or not, the trustees did not exercise it, but professed to convey the land under the provisions of the *Lands Clauses Act*, and therefore the validity of the sale must be determined without reference to the power.—Secondly, that the trustees, being trustees of the land for *femes covertes* who were absolutely entitled for their separate use, were not persons competent to contract with a railway company for the sale of the land under the 7th section of the *Lands Clauses Act*, 1845, and that the sale was for that reason invalid.—Thirdly, that the sale was also invalid by reason of the appointment by the trustees of one of themselves as surveyor to value the land under the 9th section of the *Lands Clauses Act*, 1845.—*Per Jessel*, M.R.: The mere fact of trustees having the price fixed by two surveyors, and then agreeing to sell for that price, instead of first agreeing to sell for a certain price and then testing the price by the valuation of two surveyors, would not in itself invalidate a sale under the 9th section of the *Lands Clauses Act*.—*Per Jessel*, M.R.: The power of sale given to the trustees by the will did not determine on the death of the tenant for life, but might have been exercised, within a reasonable time afterwards for the purpose of dividing the property. PETERS *v.* LEWES AND EAST GRINSTEAD RAILWAY COMPANY - - - **C. A. 429**

3. —— *Unpaid Purchase-money—Interest, from what time payable—Conveyance—Settled Lands—Trustees with Power of Sale—Tenant for Life, Sale by—Lands Clauses Consolidation Act*, 1845,

LANDS CLAUSES ACT—*continued.*

ss. 75, 85.] A complete contract being established between a railway company and a landowner by the notice to treat, and an award under the *Lands Clauses Consolidation Act*, 1845, fixing the amount of the purchase-money, the ordinary rules as between vendor and purchaser apply to such a contract, including the liability of the purchasing company, in a proper case, to pay interest on their unpaid purchase-money.—Thus, where the title has not been accepted before the award, and the company, not being in possession, delay paying or depositing the purchase-money, they are liable to pay interest at 4 per cent. per annum, not from the date of the award, but from the time they might prudently have taken possession; that is, when a good title was shewn.—*In re Eccleshill Local Board* (13 Ch. D. 365) disapproved of.—Where a railway company has given notices to treat to a legal tenant for life under a settlement and to the trustees of the settlement who have a bare power of sale with his consent, and the purchase-money for the life estate is fixed as between the company and the tenant for life by award under a reference to arbitration under the *Lands Clauses Act* in the usual way, the trustees taking no part in the reference, the company cannot require the sale to be completed as a sale by the trustees, but it must be completed as a sale by the tenant for life under the Act. *In re* PIGOTT AND THE GREAT WESTERN RAILWAY COMPANY - - - - - - **146**

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See WILL. 6.

LEASE—Renewal of - - - - **238**
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—— Renewal of, by executor - - **93**
See ADMINISTRATION. 3.

LEASEHOLDS—For lives—Sale of—Application of purchase-money - - - **624**
See RENEWABLE LEASE.

LEGACY—Gift over of such part as had not been paid - - - - - **218**
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—— Set-off—Costs in probate suit - **300**
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LIMITATIONS, STATUTE OF—*Action—Decree—Creditors*—21 *Jac.* 1, *c.* 16.] In an administration action commenced in December, 1878, by one executor of a testator, who was also a creditor of his testator, against his co-executor, the usual judgment in a creditor's action was pronounced in December, 1879, and some time afterwards a claim was brought in by a creditor against the estate upon a promissory note of the testator, dated in November, 1873:—*Held*, that the claim was barred by the statute.—*Sterndale* v. *Hankinson* (1 Sim. 393) observed upon. *In re* GREAVES, DECEASED. BRAY *v.* TOFIELD - - **551**

2. —— *Mortgage—Foreclosure Action—"Payment" of Principal or Interest—3 & 4 Will. 4, c. 27, ss. 2, 24, 40—7 Will. 4 & 1 Vict. c. 28—37 & 38 Vict. c. 57.*] A simple foreclosure action is not an action to recover the money secured by the mortgage, but is an action to recover land. Therefore it is within sects. 2 and 24 of the Act 3 & 4 Will. 4, c. 27, and not within sect. 40.—The "last payment of any part of the principal

LIMITATIONS, STATUTE OF—*continued.*
money or interest secured" by a mortgage, mentioned in the Act 7 Will. 4 & 1 Vict. c. 28, may be made by the mortgagor or his agent, or by any person who, as between the mortgagor and the mortgagee, is liable to make any payment to the mortgagee in satisfaction of the mortgage debt.—Therefore, a payment of rent made by a tenant of the mortgaged property to the mortgagee, in consequence of a notice by the mortgagee requiring the rent to be paid to him, within twelve years before the commencement of a foreclosure action, though made without the knowledge of the mortgagor, will keep alive the mortgagee's right to foreclose, although no payment of principal or interest has been made by the mortgagor for more than twelve years before the commencement of the action. HARLOCK *v.* ASHBERRY - 229

3. —— *Mortgage of Ship—Sale by First Mortgagee—Claim for an Account by Second Mortgagee—Express and Constructive Trust.*] The second mortgagee of a ship claimed an account against the first mortgagee, who had sold the vessel upon the mortgagor becoming bankrupt. Defendant offered to pay a specific amount. The action having been commenced more than six years after the sale, the Defendant pleaded the *Statute of Limitations.* The Plaintiff set up an express trust as a bar to the statute:—*Held,* that there was no express trust; that in case of an ascertained surplus the first mortgagee might be constructively a trustee of the surplus, but after six years, evidence could not be adduced to prove a surplus:—But *held,* that although the statute was not avoided on the ground of express trust, it was in this case avoided by an acknowledgment within six years of an unsettled account pending, which by itself would have sufficed, and also by a promise to pay what should be found due. The Plaintiff was therefore entitled to an account.—Where the mortgagee of his own mere motion realized the mortgaged property, he was held not to be entitled to interest in lieu of notice.—An express trust bars the statute equally as to personalty and realty by force of the *Judicature Act,* 1873, s. 25, sub-s. 2. BANNER *v.* BERRIDGE 254

4. —— *Receiver—Debt of Record—Trustee.*] Money not accounted for and due from a receiver under the Court is, by his recognizance, made a debt of record, although the balance due has not been ascertained.—The receiver is a trustee of such money for the persons entitled thereto, and cannot, as against them, avail himself of the *Statute of Limitations,* although his final accounts have been passed and the recognizances vacated. SEAGRAM *v.* TUCK - - - - 296

LIMITED ADMINISTRATION - - 347
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LIQUIDATION - - - - 381
See BANKRUPTCY. 6.

LUNATIC—*Access to alleged Lunatic—Order for Visitors in Lunacy to see the alleged Lunatic—Inquiry in London as to State of Mind of Person in the Country.*] A petition for an inquiry into the state of mind of an alleged lunatic having been presented, and disputes having arisen as to the terms under which access of medical witnesses should be allowed, the Court made an order that two of the visitors in lunacy should see the alleged lunatic and report to the Court.—The rule is not inflexible that an inquiry by a jury as to the state of mind of an alleged lunatic must take place near his place of residence, and there being reason to believe that a strong local feeling as to the proceedings existed in the neighbourhood where the alleged lunatic resided, the inquiry was directed to be held in *London.*—When the medical witnesses for the alleged lunatic had seen her alone it was held that they were not entitled to be present when the medical witnesses for the Petitioner saw her. *In re* ——, AN ALLEGED LUNATIC - - - - C. A. 26

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MINE—Company for working—*Cornwall* 472
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—— Cost-book mine - - - - 660
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MISTAKE—Separation deed—Specific performance - - - - - 670
See HUSBAND AND WIFE. 1.

MONEY—In Court—Investment - - 646
See LANDS CLAUSES ACT. 1.

MORTGAGE—*Attornment Clause—Distress—Application of Proceeds.*] The proceeds of a distress for rent levied under an attornment clause in a mortgage deed are, in the absence of any provision to the contrary in the deed, applicable to the payment of principal as well as interest.—The fact that the yearly rent reserved by the attornment clause is equal in amount to the yearly interest of the mortgage debt as provided by the deed, and is made payable on the same days, is not of itself sufficient to displace the *primâ facie* right of the mortgagee to apply the proceeds of the distress in satisfaction of principal as well as interest.—*Hampson v. Fellows* (Law Rep. 6 Eq. 575) not followed. *Ex parte* HARRISON. *In re* BETTS - - - - - C. A. 127

2. —— *Equitable Priorities—Mortgage by Deposit—Incumbrancers without Notice—Fraud—Possession of Title Deeds—Estoppel.*] In 1873, *D.,* in order to carry out a fraudulent scheme, obtained a transfer to himself of mortgages of freehold property, and after various dealings with it the legal estate was, in September, 1875, conveyed by a mortgagee to *H.* in trust for *M.,* and in March, 1876, by *H.* to *M. M.* was alleged to have been an accomplice of and trustee for *D.*—In August, 1874, in pursuance of this scheme, *T.,* claiming to be entitled to this property under a fictitious lease for ninety-eight years, purporting

MORTGAGE—*continued.*
to have been granted to him in March, 1870, by a merely fictitious freeholder (an agent and accomplice of *D.*), demised the property by way of mortgage to *A.*—In November, 1874, *M.*, claiming to be entitled to the same property under a fictitious lease for ninety-nine years, also dated March, 1870, and purporting to be granted to him by *T.*, demised the property by way of mortgage to *B.*, the mortgage deed being executed by *M.* only.—In January, 1877, *M.* (to whom the legal estate had been conveyed in March, 1876) deposited the genuine title deeds of the property with *C.* upon a memorandum charging his estate and interest in the lands comprised in the deeds and a statutory declaration of title; and further advances were made to *M.* and *D.*, who came forward and stated that *M.* was merely a trustee for him of the property.—In 1878, *D.*, *M.*, and *T.* were convicted and sentenced to penal servitude for forgery and fraud in connection with this property, and *C.*, as equitable mortgagee, entered into possession.—In an action by *A.* to settle the priorities of himself, *B.*, and *C.*, as incumbrancers on the property:—*Held*: 1. That, assuming *T.* to have been the agent of *D.*, so that his representations to *A.* of having a good title were binding on *D.*, such representations followed by the acquisition of the property beneficially by *D.* did not bind the estate so as to give *A.* a prior equitable charge as against subsequent purchasers for value without notice.—2. That the like representations of *M.* to *B.*, followed by the acquisition, first, of the equitable, and afterwards of the legal estate by *M.*, did not put *B.* in any better position, and that the doctrine of estoppel did not apply so as to convert the fictitious title acquired by *B.* from *M.* in November, 1874, into a valid legal title *ab initio* upon the conveyance of the legal estate to *M.* in March, 1876.—3. That as purchaser for value without notice by deposit of the genuine title deeds, *C.*, though subsequent in date, was entitled in priority over *A.* and *B.* Keate *v.* Phillips - 560

3. —— *Solicitor and Client—Mortgage by Client to Solicitor—Power of Sale—Appropriation of Rents by Mortgagee in Possession.*] A solicitor advanced money to his client on a second mortgage, in which was inserted a power of sale exercisable at any time without the usual proviso requiring that notice should be given, or some interest should be three months in arrear; and it was not shewn that he explained to the client that the power was not in the usual form. The solicitor afterwards took possession, and for several years received the rents, which, together with some payments made by the mortgagor, exceeded the interest on both mortgages. He then sold the property without notice.—*Held* (affirming the decision of *Fry*, J.), in an action by the mortgagor against the solicitor, that the omission from the power of sale of the usual qualifying clause was a breach of duty, and that the mortgagee was liable in damages as for an improper sale, unless it could be shewn that some interest was three months in arrear; and whether the absence of explanation did not make it improper even if there was interest in arrear, *quære.*—*Held*, that the fact that the mortgagee had received rents to an amount more than sufficient to pay the interest would not by itself prove that there was no interest in arrear if no appropriation was shewn to have been made.—The *dictum* in *Brocklehurst* v. *Jessop* (7 Sim. 442) overruled.—But *held*, that, as in an account sent by the mortgagee to the mortgagor the interest was treated as satisfied up to a certain day out of the rents, there was evidence of an arrangement that the rents should be applied in discharge of interest, and that, as the final account shewed that if the rents were thus appropriated there would be no interest in arrear at the time of sale, the sale was improper.—Whether a mortgagee in possession having a balance of rents in hand more than sufficient for payment of the interest and all expenses he has incurred can be heard to say that interest is in arrear so as to justify a sale because no account has been rendered and no appropriation made, *quære.*—*Held* (reversing the decision of *Fry*, J.), that the difference between party and party costs and solicitor and client costs of the present action could not be given to the Plaintiff by way of damages. Cockburn *v.* Edwards - - - C. A. 449

—— Company—Borrowing powers—Priority 334
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—— Distress—Winding-up of company - 649
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—— Executor—Lease of testator - - 93
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NAME—Manufactured article - - 395
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NOTICE—Act of bankruptcy - - 137
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ONUS PROBANDI—Impeaching voluntary settlement - - - - - - 668
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PARTITION SUIT—*Practice—Partition Act*, 1876 (39 & 40 *Vict. c.* 17), *s.* 6—*Bequest for Sale by Married Woman.*] The request for a sale in a partition action, when made on behalf of a married woman, should be a writing signed by her authorizing and requesting her solicitor to instruct counsel to ask for a sale. Grange *v.* White [612

PARTNERSHIP—*Profit and Loss—Legal Effects of Contract—Dissolution—Sale of Assets and Goodwill.*] The Plaintiff, having been a clerk in the

PARTNERSHIP—*continued.*

Defendant's firm, entered into a verbal agreement with him for a share of profit and loss in the proportion of one-fifth to the Plaintiff and four-fifths to the Defendant, it being stipulated that the building in which the business was carried on should remain the property of the Defendant. The Plaintiff alleged that the agreement was for a partnership, and claimed a dissolution and an account of assets. The Defendant denied the partnership, and alleged that the Plaintiff was only manager:—*Held*, that the agreement for sharing profit and loss in certain proportions conferred all the rights of partnership *inter se*, subject to the stipulation as to the buildings remaining the property of one partner; that the Defendant could not maintain that the legal effects of partnership should not follow such a contract, and that the Plaintiff had a right to a dissolution and sale of the assets of the partnership, including the goodwill: such sale to be conducted by an independent firm of solicitors, with power to either partner to bid. Pawsey *v.* Armstrong - - - - - 698

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POWER OF APPOINTMENT—Failure—Falling into residue - - - - 499
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PRACTICE—*Appeal by one of several Plaintiffs.*] Two of the three trustees of a settlement brought an action to have the trusts administered under the direction of the Court. *Malins*, V.C., dismissed the action with costs. One of the Plaintiffs having declined to concur in an appeal, the other appealed alone.—The Court of Appeal *held* that such an appeal was regular, and must be allowed to proceed; and, being of opinion that a sufficient ground had been shewn for asking the direction of the Court, a decree for administration of the trusts was made. Beckett *v.* Attwood C. A. 54

2. —— *Appeal for Costs—Rules of Court*, 1875, *Order* lv., *r.* 1—*Supreme Court of Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 49.] A married woman, who was one of the executors of a testator and also tenant for life of the residue, filed a bill for administration of the estate. Upon the accounts being taken it turned out that the residuary estate was insufficient for payment of debts and costs, and that it would be necessary to resort to specifically bequeathed property. *Malins*, V.C., on further consideration, refused to give the Plaintiff any costs of the suit, and ordered the next friend to pay the costs of taking an account of what, if anything, was due from another of the executors on an account current between him and the testator.—The Plaintiff appealed:—*Held*, that as a residuary legatee or executor filing a bill for administration is entitled to costs out of the estate, unless some special grounds are shewn for depriving him of them, the costs in question were not costs in the discretion of the Court within the meaning of the *Supreme Court of Judicature Act*, 1873 (36 & 37 Vict. c, 66), s. 49, and that an appeal would lie. Farrow *v.* Austin [C. A. 58

3. —— *Appeal—Extension of Time to appeal—Rules of Court*, 1875, *Order* lviii., *rr.* 9, 15.] A petition having been presented for payment out of Court of a fund paid in under the *Lands Clauses Act* as the purchase-money of a devised estate, the Court, on the 18th of June, made an order declaring the construction of the will and directing inquiries as to the persons interested. An application was made on behalf of some of the parties who were resident in *America* to extend the time for appealing to four weeks from the 8th of July, in order to allow time for the persons acting for them under a power of attorney to consult them as to appealing:—*Held*, that, as the order was a final one, the case, though within the letter was not within the spirit of rule 9, the Rules of Court, 1875, Order lviii., requiring an appeal to be brought within twenty-one days, and that the extension of time ought to be granted. *In re* Leonard Jacques - - C. A. 392

4. —— *Appeal—Staying Proceedings—Action dismissed—Rules of Court*, 1875, *Order* lviii., *rr.* 16, 17.] Where an action has been dismissed with costs, an application to stay proceedings for costs pending an appeal must be made in the first instance to the Court below and not to the Court of Appeal.—*Wilson* v. *Church* (11 Ch. D. 576) explained. Otto *v.* Lindford - C. A. 394

5. —— *Costs—Co-Defendants—Contribution.*] Where co-defendants are decreed to pay the costs of an action, one co-defendant cannot, by an independent proceeding, obtain contribution in respect of such costs against the other. Dearsley *v.* Middleweek - - - - 236

6. —— *Costs—Defendant—Withdrawal of Defence—Common Law Procedure Act*, 1852, *s.* 205—*Rules of Court*, 1875, *Order* xxiii., *r.* 1.] Leave was given to one of two Defendants in an action of ejectment to withdraw his defence on the terms of his paying to the Plaintiff their costs of the action, "so far as they were occasioned by the said defence of the said Defendant":—*Held*, that the only costs which such Defendant was liable to pay under this order were the increased costs occasioned by such Defendant having defended the action; and that he was not liable to pay an apportioned part of the Plaintiff's general costs. Real and Personal Advance Company *v.* McCarthy - - - C. A. 362

PRACTICE—*continued.*

7. —— *Interrogatories—Denial of Plaintiff's Title—Rules of Court,* 1875, *Order* XXXI., *rr.* 5, 19.] Where a defendant's answering an interrogatory cannot help the plaintiff to obtain a decree, but will only be of use to him if he obtains a decree, the Court has a discretion whether to oblige the defendant to answer it before trial, and will not do so where compelling such discovery would be oppressive.—The Plaintiff alleged that *G.* had deposited money with the Defendant *E.* in trust for *S.* and *A.* (both since deceased (successively for their lives, and then for the Plaintiff and another person absolutely. That *E.* had employed it in trade and made large profits, and had paid the interest to *S.* and *A.* for their lives, but now refused to pay over the principal. *E.*, by his defence, admitted the deposit, but denied the trust, and stated that he had only held the money for *G.* to draw upon, and had many years ago paid it away by *G.'s* directions; he denied payment of interest to *S.* and *A.* The Plaintiff delivered, among others, interrogatories requiring *E.* to set out (1) the dates and particulars of the payments made by him out of the deposited sum; (2) an account of the profits made by the employment of the money in trade; (3) whether *E.* had not paid to *S.* and *A.* quarterly sums by way of interest on the moneys, and if not, then he was asked whether he had not during some and what years paid to *S.* and *A.* certain and what moneys, and whether or not quarterly, or at some and what dates and under what agreement, or for what reason or in respect of what matters; and was required to set out an account of all moneys paid by him since 1854 to *S.* and *A.*, or either of them.—*E.* filed an affidavit verifying his defence and denying the trust, denying the payment of any interest to *S.* or *A.* on the deposited sum, denying the Plaintiff's title, and declining to make any further answer. *Fry*, J., ordered *E.* to make a further answer as to (1) and (3). *E.* appealed.—*Held,* on appeal, that *E.* was not bound to answer interrogatory 1, as an answer to it could not furnish evidence to establish the alleged trust, and could not be of any use to the Plaintiff except by discrediting *E.'s* evidence if he made erroneous statements as to the particulars of his payments, and that it would be oppressive to require him to go through his books for a number of years for that purpose:—*Held,* further, that *E.* ought not to be compelled to answer as to the profits, for that it would be oppressive to call upon him to enter into a difficult account, which could not help the Plaintiff to obtain a decree and would be useless if a decree was not obtained:—*Held,* that the third interrogatory was too wide, as it extended to payments not connected with the sums to which the action related, and that the Plaintiff was not entitled to a full answer:—*Held,* further, by *Jessel*, M.R., and *Brett*, L.J., that as the Plaintiff had not in the Court below asked for a qualified order, but had insisted on a full answer, the order for a further answer ought simply to be discharged.—*Dissentiente, Cotton,* L.J., who was of opinion that an order ought to be made for a further answer to a limited extent. PARKER *v.* WELLS - - - **C. A. 477**

8. —— *Receiver and Manager—Mortgage—Legal Mortgagee—Business—Hotel—Injunction—Form of Order.*] A legal mortgagee of business premises, such as an hotel, who is prevented by the mortgagor from taking possession under the mortgage, may obtain, upon an interlocutory application, an order for the appointment of a receiver and manager, and an injunction restraining the mortgagor from interfering with the management of the business and the possession of the premises.—Form of order appointing a receiver and manager, with an injunction. TRUMAN & CO. *v.* REDGRAVE - - - **547**

9. —— *Sequestration — Divorce Action—Enforcing Sequestration.*] A co-respondent in a divorce action was ordered to pay damages and costs, and a writ of sequestration was issued by the Probate and Divorce Division to enforce such order. He was entitled to certain trust moneys which were being administered in a Chancery action:—*Held*, that the Court of Chancery had jurisdiction on motion of the sequestrators in the Chancery action to order the trust moneys to be paid to the sequestrators. *In re* SLADE. SLADE *v.* HULME - - - **653**

—— Appeal for costs - - - **76**
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—— Leaseholds for lives—Settled Estates Act
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PURCHASER WITHOUT NOTICE—Conveyance obtained by undue influence - 188
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RAILWAY COMPANY—*Abandonment—Parliamentary Deposit—Judgment Creditor—Undertaking—Receiver—Unpaid Calls—Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *ss.* 4, 31, 35—*Abandonment of Railways Act*, 1869 (32 & 33 *Vict. c.* 114).] A railway company which has never commenced to acquire the lands or construct the railways authorized by their Act is not an "undertaking," within the meaning of sect. 4 of the *Railway Companies Act*, 1867, of which a receiver can be appointed under that section.—*Semble*, the powers of a receiver appointed under the above section do not extend to getting in unpaid calls. *In re* Birmingham and Lichfield Junction Railway Company 155

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—— Purchase of lands - - 146, 429
See Lands Clauses Act. 2, 3.

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—— Balance due from—Debt of record - 296
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—— Mortgage - - - - 547
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—— Copyright—Part of book - - 76
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RENEWABLE LEASE—*Estate pur autre Vie—Successive Limitations—Executory Devise—Power of Alienation—Leasehold for Lives—Tenant for Life and Remainderman—Overriding Trust for Renewal—Refusal of Reversioner to renew—Sale under Settled Estates Act—Application of Purchase-money.*] When an estate *pur autre vie* is made the subject of successive limitations, the power of alienation of the successive takers is to be regulated, as far as possible, by analogy to the rules which govern similar limitations of an estate in fee simple.—Therefore an executory devise of an estate *pur autre vie* cannot be defeated by the prior taker of a *quasi* estate in fee simple.—Leaseholds for lives were devised on trust for *J.* in fee, but, if he should die without leaving issue living at his death, then on trust for *W.* in fee, and there was an overriding trust for renewal of the lease out of the rents. After the death of the testator the reversioner refused to renew the lease or to sell the reversion, and the lease was sold under the provisions of the *Settled Estates Act*:—*Held*, that the purchase-money must be invested in ordinary securities, and the income only paid to *J.* for his life.—*In re Wood's Estate* (Law Rep. 10 Eq. 572), *Hollier* v. *Burne* (Law Rep. 16 Eq. 163), and *Maddy* v. *Hale* (3 Ch. D. 327) followed. *In re* Barber's Settled Estates [624

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SETTLEMENT—*After-acquired Property—Covenant to settle—Separate Use.*] By a marriage settlement, after a recital that on the treaty for the marriage it was agreed that all real and personal property which during the coverture should devolve upon or vest in the wife or the husband in her right to the value of £200 at any one time should be settled upon the trusts thereinafter declared, it was witnessed that it was thereby agreed and declared between and by the parties thereto, and the husband thereby covenanted with the trustees that if at any time during the coverture any real or personal estate should devolve on or vest in the wife or the husband in her right to the amount in value of £200 at any one time, the husband would make, do, and execute, or cause and procure to be made, done, and executed, and join and concur in making, doing, and executing all such conveyances, &c., as would effectually vest such real and personal estate in the trustees upon the trusts therein declared. After the marriage a deed was executed by the wife's mother, under which, during the coverture, a sum exceeding £200 became payable to the wife for her separate use :—*Held*, by *Fry*, J., that this sum was within the covenant, and must be settled.—*Held*, by the Court of Appeal, that as the operative part of the deed was clear, the recital could not control it—that as the operative part of the deed only related to acts to be done by the husband, the agreement and declaration between and by the parties that those acts should be done did not import a covenant by any other party that they should be done, and that there was, therefore, no covenant by any one but the husband—that the covenant by him could not be held to relate to property over which he had no power and in which he had no interest—and that the wife, therefore, was not bound to bring into settlement property given to her separate use. Dawes *v.* Tredwell - - - - **C. A. 354**

2. —— *Married Woman—Infant—Separate Estate—Restraint on Anticipation—Covenant to settle after-acquired Property—Existing Property—Voidable Covenant—Election.*] An agreement by husband and wife, in an antenuptial settlement, for the settlement by the husband and wife of the wife's after-acquired property, is a covenant by the wife as well as by the husband, whether the wife is a minor or of full age. If the wife is a minor, and the covenant is for her benefit, it is voidable only and not void, and is binding upon all property coming to her during the coverture for her separate use, without a restraint on anticipation, until she avoids or disaffirms the covenant as to such property; for she may, after attaining twenty-one, and during the coverture, elect whether the covenant shall be binding on her separate estate or not, such right of election being a necessary consequence of a married woman's power to dispose of, without her husband's consent, property settled to her separate use: but—inasmuch as a contract by a married woman, while under coverture, affecting her separate property binds only her then existing separate property, and not separate property which she may thereafter acquire (*Pike* v. *Fitzgibbon*, 17 Ch. D. 454)—the wife, in electing to confirm the covenent, thereby binds only that separate property to which she is entitled at the date of the confirmation, and not that to which she may subsequently become entitled during the coverture.—*Semble*, the doctrine of election or compensation does not apply in the case of a married woman entitled for her separate use with a restraint on anticipation.—*Willoughby* v. *Middleton* (2 J. & H. 344) questioned on this point.—By an antenuptial settlement, dated in 1856, the lady being then a minor, after reciting that she would be entitled on attaining twenty-one to a share of her deceased father's estate, and the intention to settle the same, it was agreed and declared between the parties thereto, and the husband covenanted with the trustees, that the husband and wife and all other necessary parties would, as soon as the wife attained twenty-one, convey the share to the trustees upon trust for the wife during her life for her separate use without power of anticipation, and after her death for the husband till bankruptcy or alienation, with remainder for the issue of the marriage. And it was further agreed and declared that if the wife then was, or if at any time or times during the coverture she or her husband in her right should become seised or possessed of or entitled to any real or personal property for any estate or interest whatsoever, then and in every such case the husband and wife and all other necessary parties should assure the same to the trustees upon the trusts thereinbefore declared. The settlement contained a power for the trustees, at the request of the wife, to lend any of the trust funds to the husband on his personal security.—The wife attained twenty-one in 1857, and in 1858 she and her husband, in pursuance of the covenant in that behalf in the settlement, conveyed her share of her father's estate to the trustees of the settlement.—In 1863, upon the death of a brother, the wife became entitled under his will to certain funds thereby bequeathed to her for her separate use. These funds, and also funds arising from her share of her father's estate, were, with the assent of the wife, paid to the trustees of the settlement, and by them lent, at her request, to the husband on his personal security.—In 1880 the wife became entitled under the will of her mother to a sum of £4000, and a share of her residuary estate thereby bequeathed respectively to her for her separate use :—*Held*, that the wife could elect to retain the £4000 and share of residue for her separate use unbound by the covenant for the settlement of her after-acquired property. Smith *v.* Lucas - - - - - 531

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TRADE-MARK—*Name of Manufactured Article—Tendency to deceive.*] The Plaintiffs, the *Singer Manufacturing Company*, used the word "*Singer*" as a designation of all the sewing machines

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manufactured by them, accompanied by specific words to distinguish different kinds. The Defendant was the English agent of the *Sewing Machine Manufacturing Company*, a company established in *Berlin.* He sold sewing machines which he described in his invoices, price lists, and circulars as being made on the *Singer* system and the like, with explanations shewing that they were made in *Berlin.* He also put on some machines a label with the words "*Singer* machine," with some additional words referring to the foreign makers. He did not insist on continuing the label, but justified his use of the word "*Singer*" by alleging that it had ceased to designate machines manufactured by the Plaintiffs, and had come to mean machines made upon a certain system, by whomsoever made.—*Held*, by *Bacon*, V.C., that the Defendant's allegation was disproved, and that the Plaintiffs were entitled to an injunction both as to the label and the price lists, circulars, and invoices.—*Held*, by the Court of Appeal, that whether the Defendant's allegation were true or not, the injunction ought to be refused, except as to the label, on the ground that the other documents were not calculated to deceive by representing the Defendant's machines to have been manufactured by the Plaintiffs. Singer Manufacturing Company *v.* Loog - - **C. A. 395**

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UNDERTAKING—Railway company—Receiver
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UNDUE INFLUENCE—*Father and Child—Deed executed by Child in favour of Father—Onus Probandi — Purchaser for Value without Notice.*] When a deed conferring a benefit on a father is executed by a child who is not emancipated from the father's control, if the deed is subsequently impeached by the child, the *onus* is on the father to shew that the child had independent advice, and that he executed the deed with full knowledge of its contents, and with a free intention of giving the father the benefit conferred by it. If this *onus* be not discharged the deed will be set aside.—This *onus* extends to a volunteer claiming through the father, and to any person taking with notice of the circumstances which raise the equity, but not further.—If a solicitor purports to act in the transaction on behalf of the child, a purchaser for value is entitled to assume that he has given the child proper advice, even though he be also acting as the father's solicitor.—There is no absolute rule that in such a transaction the father and the child must be advised by different solicitors. Bainbrigge *v.* Browne - - **188**

VENDOR AND PURCHASER—*Sale by Auction—Statute of Frauds—Identification of Property.*] The Plaintiff claimed specific performance of a contract to purchase a house and premises sold by auction. After the sale the auctioneer signed the following memorandum at the foot of the conditions: "The property duly sold to *A. Shardlow*, butcher, *Pinxton*, and deposit paid at close of sale," and he also signed this receipt: "*Pinxton*, March 29th, 1880. Received of *A. Shardlow* the sum of £21 as deposit on property purchased at £420 at *Sun Inn, Pinxton*, on the above date. Mr. *G. Cottrell*, owner." The *Statute of Frauds* was set up in defence. The conditions contained no description of the property sold, but posters had been put up describing the property to be sold on the 29th of March at the *Sun Inn.*—*Held*, that the receipt, but not the poster, might be read with the memorandum, but that without the poster there was not a sufficiently definite description of the property sold and purchased to enable the Court to receive parol evidence of what the property consisted; and that consequently the *Statute of Frauds* was a good defence to the action. Shardlow *v.* Cotterell - **280**

—— Doubtful title - - - - **381**
See Bankruptcy. 6.

—— Fire insurance—Fire after contract - **1**
See Fire Insurance.

—— Interest on purchase-money - - **146**
See Lands Clauses Act. 3.

—— Purchaser without notice - - **93**
See Administration. 3.

—— Purchaser without notice - - **188**
See Undue Influence.

VESTING—Legacy—Gift over on death before final division - - - **634**
See Will. 3.

VISITOR—Lunatic—Order for access - **26**
See Lunatic.

VOLUNTARY SETTLEMENT—*Setting aside Voluntary Deed — Onus — Power of Revocation.*] When a voluntary deed is impeached the *onus* of supporting it does not necessarily rest upon those who set it up. Nor is a voluntary deed of settlement voidable by the settlor merely because it does not contain a power of revocation. Henry *v.* Armstrong - - - - - **668**

WAY—*Easement — Owner of two Tenements—Grant of one Tenement "together with all Ways now used and enjoyed therewith."*] A grant by the owner of two tenements of one of them, "together with all ways now used or enjoyed therewith," will pass to the grantee a right of way over a clearly defined path constructed over the other tenement, and at the date of the grant actually used for the purposes of the tenement which is granted, even though the path did not exist prior to the unity of possession.—*Thomson* v. *Waterlow* (Law Rep. 6 Eq. 36) and *Langley* v. *Hammond* (Law Rep. 3 Ex. 161), so far as they are contrary to this view, must be taken to have been overruled by *Watts* v. *Kelson* (Law Rep. 6 Ch. 166) and *Kay* v. *Oxley* (Law Rep. 10 Q. B. 360). Barkshire *v.* Grubb - - - - **616**

WILL — *Condition — Marriage with Consent — Guardians.*] A testator appointed his wife sole

WILL—*continued.*

guardian of his infant children, and bequeathed a legacy to each of his daughters on her attaining twenty-one or marrying with the consent of her "guardian or guardians," which should first happen. He gave the residue to his wife for life, and, after her death, gave a further legacy to each daughter who should attain twenty-one or marry with the consent "of her guardian or guardians." He empowered the trustees, during the minority of the daughters, to pay the income of their contingent legacies to his wife for their maintenance and education, and, in case of her decease, empowered them to apply so much of the income of the contingent legacies as they might think fit for the maintenance of the infant daughters presumtively entitled thereto, with power to pay it to the guardian or guardians of the daughters for that purpose. After the death of the wife, a daughter married under twenty-one without the consent of any guardian or guardians, there being none, and died shortly afterwards under the age of twenty-one years:—*Held*, by *Fry*, J., and by the Court of Appeal, that the condition was not complied with, and that the daughter took no vested interest in the legacies —the condition not being made inoperative by there being no guardians, since guardians could have been appointed by the Court, and the testator, on the language of his will, must be taken to have contemplated such an appointment. By the testator's marriage settlement the trust funds, after the death of the husband and wife, were to be held in trust for such children as, being a son or sons, attained twenty-one, or, being a daughter or daughters, attained that age or married with the consent of their parents or guardians:—*Held*, by *Fry*, J., and by the Court of Appeal, that the same rule applied to this gift, and that the daughter took no vested interest:—*Held*, by the Court of Appeal, that the consent of a guardian appointed by the infant herself would not have satisfied the condition. *In re* BROWN'S WILL. *In re* BROWN'S SETTLEMENT - - **C. A. 61**

2. —— *Contingent Remainder—Executory Devise—Life Estate—Devise to such Children of Tenant for Life "as either before or after her decease" should attain twenty-one or marry.*] A testatrix devised a freehold estate to her granddaughter *E.* during her life, and from and after her death to such of her children living at her death "as either before or after her decease" should, being males, attain twenty-one, or, being females, attain that age or marry, in fee simple as tenants in common: and if there should be no such child, then over. *E.* survived the testatrix, and died leaving seven children, of whom five had attained twenty-one at the time of her death, and two, a son and a daughter, were infants, the daughter being also a spinster:—*Held*, that the five children took vested interests liable to open to let in the two other children on their fulfilling the conditions of the will. *Brackenbury* v. *Gibbons* (2 Ch. D. 417) not followed. *In re* LECHMERE AND LLOYD **524**

3. —— *Divesting of Legacy—Vesting—Gift over in case Legatee should die before "final division" of Estate.*] A testator gave the residue of his estate equally between four persons, and gave the shares over to the children of the legatees in case the legatees respectively should die before the "final division" of his estate. Two of the legatees died more than a year after the death of the testator. The estate had not then been fully realized and distributed:—*Held*, that the "final division" of the estate meant the period of a year from the death of the testator, and that the shares of the deceased legatees had not gone over. *Johnson* v. *Crook* (12 Ch. D. 639) approved. *In re* WILKINS. SPENCER *v.* DUCKWORTH - - **634**

4. —— *Divesting of Legacy—Uncertainty—Gift over of Legacy or so much thereof as shall not have been paid to or received by Legatee—Words—Paid to or received by.*] A gift over of a legacy or so much thereof as should not have been paid to or received by the legatee:—*Held*, not to be void for uncertainty, on the ground that the words referred, not to the time of actual payment or receipt, but to the time when it was the duty of the executors to pay the legacy.—*In re Arrowsmith's Trusts* (29 L. J. (Ch.) 774; 2 D. F. & J. 474) approved and followed.—*Hutchin* v. *Mannington* (1 Ves. 366) and *Martin* v. *Martin* (Law Rep. 2 Eq. 404) distinguished.—*Bubb* v. *Padwick* (13 Ch. D. 517) disapproved.—*Johnson* v. *Crook* (12 Ch. D. 639) approved. *In re* CHASTON. CHASTON *v.* SEAGO - - - - - **218**

5. —— *Inconsistent Clauses—Direction as to Time of Payment inconsistent with prior Gift.*] A testator gave to his wife, so long as she should continue his widow and until all his four daughters by his former wife should attain twenty-one or die under twenty-one, an annuity of £800, and a further annuity of £100 in respect of each of such daughters who should for the time being be under twenty-one, such annuities to be employed by her in maintaining herself and his said daughters, and in educating the daughters. After all his four daughters had attained twenty-one or died, be bequeathed to his wife during widowhood £600 a year, and after her future marriage £200 a year. And if he should have any children by his then wife, he bequeathed to his wife in respect of each of such children who should for the time being be under twenty-one a further annuity of £150, to commence after all his said four daughters should have attained twenty-one or died, to be applied by his wife in maintaining and educating such children, and to be paid by equal half-yearly payments, the first of such payments to be made at the expiration of six calendar months from his decease. He gave his residuary estate among such of his children by both wives as being sons should attain twenty-one, or being daughters attain that age or marry, in equal shares, subject to a provision for making the share of each child by the second wife exceed the share of a child by the former wife by £3000. There was the usual clause of maintenance, subject to a proviso that the power of giving maintenance should not be exercised as to any child while the annuity bequeathed to his wife in respect of such child was payable, unless the trustees thought the annuity insufficient. At the testator's death several of the daughters by the first wife were under twenty-one. —*Held*, by *Jessel*, M.R., that the annuities of £150 became payable from the testator's death, and were not postponed till all the daughters by the

WILL—*continued.*

first wife had attained twenty-one or died, on the ground that, having regard to the scope of the will, the former of the two inconsistent clauses was to be rejected rather than the latter, independently of the rule that of two inconsistent clauses in a will the latter is to be preferred.—*Held*, on appeal, that this was not a case of two inconsistent gifts, but of a gift of something to arise at a future time with a subsequent direction as to the time of payment which was inconsistent with the terms of the original gift, and that such subsequent direction could not enlarge the gift, but must be rejected as inconsistent with it.—*Held*, that evidence that the latter of the two clauses was left in the will by mistake, and contrary to the testator's express instructions, was not admissible. *In re* Bywater. Bywater *v.* Clarke - - - **C. A. 17**

6. —— *Lapse—Contingent Legacy.*] A testatrix gave the residue of her estate equally between a number of persons whom she named, and such of the children of *J. G.* as were living at the date of her will. *J. G.* had died before the date of the will and had left no children:—*Held*, that there was no lapse of the share given to the children of *J. G.*, but that the whole residue was divisible among the other persons named.—*Re Hornby* (7 W. R. 729) followed. *In re* Spiller. Spiller *v.* Madge - - - - - - **614**

7. —— *Power of Appointment—Testamentary Appointment—Wills Act* (1 *Vict. c.* 26)—*Power created before but exercised after Act—Void Appointment falling into residuary Appointment—"Devise."*] An instrument exercising a special or general power of appointment over property must be executed and construed according to the rules for the time being applicable to instruments of that kind, although the power may have been created before, but exercised after, an alteration in the law as to the construction and mode of execution of such instruments.—The word "devise" in the *Wills Act* includes in general a devise by way of appointment under a special or general power: consequently, where a testator makes a will operating as an exercise of a special or general power, a devise of real estate by way of appointment which fails or is void, falls, under sect. 25, into the residuary devise (if any) by way of appointment, unless a contrary intention appears by the will. Freme *v.* Clement - **499**

8. —— *Remoteness—Gift to Class—Substitution.*] A testator directed his trustees, after the death of the longest liver of his son, his daughter, and any widow whom the son might leave, to sell his real estate and to stand possessed of the proceeds and of the rents and profits until sale, upon trust to pay and apply them "unto and equally amongst all and every the child and children of my son *W.* and daughter *M.* share and share alike, and the lawful issue of such of them as may be then dead leaving issue, such issue to be entitled to no more than their parent or respective parents would have been if living." He directed that if his daughter's son then living should die without leaving issue, or, leaving issue, all of them should die under age and unmarried, the trustees should pay the share which would have been payable to him under the above trusts to the children of *J.*; and that if the testator's son died without leaving issue, or all of them died under age and unmarried, the trustees should pay the share which would have been payable to them under the trusts aforesaid to the children of *J.* and *M.* The heir-at-law claimed the *corpus* as undisposed of, on the ground that the disposition of the proceeds of sale was void for remoteness as being a gift to a class not ascertainable till at or after the death of the son's widow, who might be a person unborn at the testator's death:—*Held*, that the gift was not a gift to such children of the son and daughter as should be living at the period of distribution and the issue of such of them as should be then dead, but a gift to all the children of the son and daughter, with a gift over by way of substitution of the shares of such of them as might die before the period of distribution leaving issue—that when the gift over of any share was void for remoteness the original gift remained unaffected—and that the heir-at-law had no title. Goodier *v.* Johnson - - - **C. A. 441**

—— Survivor - - - - **213**
See Woman past Child-bearing.

WINDING-UP.
See Cases under Company. 5—9.

WITHDRAWAL OF DEFENCE—Costs - **362**
See Practice. 6.

WITNESS—Lunacy—Medical witnesses - **26**
See Lunatic.

WOMAN PAST CHILD-BEARING—*Will—Construction—"Survivor."*] A testator bequeathed the dividends of a sum of £10,000 Consols unto and equally between his four daughters, and from and immediately after their several and respective deceases he bequeathed the £10,000 to their children respectively—viz., one-fourth part thereof unto and equally between the children of each daughter. And, in case any one or more of the daughters should die without leaving issue her or them surviving, he bequeathed the share or shares of the stock so bequeathed to and intended for the issue (had there been such) "unto the survivors or survivor" of the four daughters, equally if more than one, and if but one, to that one, absolutely. Three of the daughters married, and died leaving children. The fourth was the longest liver, and was a spinster of the age of fifty-four:—*Held*, that on her death without leaving issue she would be entitled to her own one-fourth share of the £10,000 absolutely; that it might be assumed that she would never have any children; and that the share might be transferred to her at once.—*Maden* v. *Taylor* (45 L. J. (Ch.) 569) approved and followed. Davidson *v.* Kimpton - - **213**

WORDS—"All ways now used and enjoyed" **616**
See Way.

—— "Devise" - - - - **499**
See Will. 7.

—— "Final division" - - - **634**
See Will. 3.

—— "Survivor" - - - - **213**
See Woman past Child-bearing.

YOUNGEST SON—Customary heir—Copyholds
See Copyhold.

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